SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 264

REGINALD LEE FRAZIER, Attorney at Law,
New Bern, Craven County, North Carolina,

Petitioner,

—versus—

THE NORTH CAROLINA STATE BAR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

SAMUEL S. MITCHELL
ROMALLUS O. MURPHY
126½ East Hargett Street
Raleigh, North Carolina
MOSES BURT, JR.
213½ West Main Street
Durham, North Carolina
HERMAN L. TAYLOR
Post Office Box 20027
Greensboro, North Carolina
JOHN H. WHEELER
Mechanics & Farmers Bank
Durham, North Carolina
J. LEVONNE CHAMBERS
405½ East Trade Street
Charlotte, North Carolina
EARL WHITTED, JR.
209 South James Street
Goldsboro, North Carolina
CHARLES MORGAN, JR.
American Civil Liberties Union
5 Forsythe Street, N.W.
Atlanta, Georgia

Counsel for Petitioner

MITCHELL & MURPHY
126½ East Hargett Street
Raleigh, North Carolina
Of Counsel

INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	5
Statement of Case	7
How the Federal Questions Were Raised and Decided Below	15
Reasons for Granting the Writ	17
Conclusion	25

Appendices

Appendix "A"—Opinion of the Supreme Court of North Carolina	27
Appendix "B"—Judgment of the Superior Court of Craven County	44
Appendix "C"—Judgment of the Full Council of the North Carolina State Bar	52
Appendix "D"—Report of the Trial Committee	62
Appendix "E"—North Carolina General Statutes 84-28	73
Appendix "F"—Rules of the North Carolina State Bar, Article VI	78
Appendix "G"—Assignments of Errors	82

Table of Authorities

PAGE

Anderson v. McRae, 211 N. C. 197, 189 S. E. 639 16
Arizona Eastern R. Co. v. Head, 224 P. 1057, 26 Ariz. 259 20

Chambers v. Baltimore, etc., R. Co., 207 U. S. 142, 28 S. Ct. 34, 52 L. Ed. 143 24
Chicago, etc. R. Co. v. Nye Schneider Fowler Co., 260 U. S. 35, 43 S. Ct. 55, 67 L. Ed. 115 20
Clark Equipment Co. v. Johnson, 261 N. C. 269, 134 S. E. 2d 327 21
Cole v. Arkansas, 333 U. S. 196, 68 S. Ct. 514, 92 L. Ed. 644 ..... 18, 19

DeMond v. Liquor Control Commission, 129 Conn. 642, 30 A. 2d 547 20
Douglas v. Alabama, 380 U. S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 23

First Unitarian Church of Los Angeles v. Los Angeles County, 357 U. S. 513, 78 S. Ct. 1350, 2 L. Ed. 2d 1460 23

Garrity v. State of New Jersey, —— U. S. ——, 87 S. Ct. ——, 17 L. Ed. 2d 562 24
Gonzales v. United States, 348 U. S. 407, 75 S. Ct. 409, 99 L. Ed 497 20
Greene v. McElroy, 360 U. S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 23

Holt v. Virginia, 381 U. S. 131, 85 S. Ct. 1375, 14 L. Ed. 2d 290 21
Hornsby v. Allen, 326 F. 2d 605 (5th Cir. 1964) 23

PAGE

In Re Burton, 257 N. C. 534, 126 S. E. 2d 581 .....17, 18-19

Jaffe v. State Department of Health, 135 Conn. 339, 64 A. 2d 330, 6 A. L. R. 2d 664 20

James Henry White et ux v. Hattie McCarter, et al., 261 N. C. 362, 134 S. E. 2d 612 .....23, 24

Louisville etc. R. Co. v. Garrett, 231 U. S. 208, 34 S. Ct. 48, 58 L. Ed. 229 20

Missouri P. R. Co. v. Tucker, 230 U. S. 340, 33 S. Ct. 961, 57 L. Ed. 1507 20

Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 741 21

Pointer v. Texas, 380 U. S. 40, 85 S. Ct. 1065, 13 L. Ed. 2d 923 23

Pyle v. Kansas, 317 U. S. 213, 63 S. Ct. 177, 87 L. Ed. 214 21

Spevak v. Kleen, —— U. S. ——, 87 S. Ct. ——, 17 L. Ed. 2d 574 24

State Bar v. Frazier, 269 N. C. 625, —— S. E. 2d —— 2, 3, 14

United States v. Rutkin, 212 F. 2d 641 (3rd Cir. 1954) 21

Willner v. Committee on Character Fitness, 373 U. S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 .....19, 23

Constitutional Provisions

PAGE

Article 6, Clause 2, Federal Constitution 24

Privileges or Immunities, Due Process and Equal Protection Clauses, Fourteenth Amendment, Federal Constitution 5, 23

State Statutes

North Carolina General Statutes

1-194 ..... 5, 18, 20

84-28(3)(f) 6, 9, 17, 18, 19, 20

143-315 21

United States Code

28 U. S. C. 1257(3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Number .....

REGINALD LEE FRAZIER, Attorney at Law,
New Bern, Craven County, North Carolina,

Petitioner,

—versus—

THE NORTH CAROLINA STATE BAR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

To the Justices of the Supreme Court of the United States:

The petitioner herein prays that a writ of certiorari issue to review the final Judgment of the Supreme Court of North Carolina which was entered on the 22nd day of March, 1967, and which affirmed the Judgment of the Superior Court of Craven County. The Judgment of the Superior Court of Craven County is dated October 7, 1966, and was signed by Honorable Rudolph I. Mintz, Superior Court Judge. The Judgment affirmed by the Supreme Court of North Carolina ordered a twelve month suspension from law practice against petitioner for alleged corrupt and unprofessional conduct in the course of law practice.

Opinion Below

The Opinion of the Supreme Court of North Carolina is reported as follows: Volume 269, North Carolina Reports, Page 625 (269 N. C. 625); Volume ....., Southeastern Reports, Second Series, Page ..... (..... S. E. 2d .....). The Opinion is set forth in Appendix "A", *infra*.

Jurisdiction

The Judgment of the Supreme Court of North Carolina was entered on March 22, 1967, and is set forth in the Record before this Court. The Opinion of the Supreme Court of North Carolina affirmed the Judgment of the Superior Court of Craven County and was entered on the 22nd day of March, 1967.

Jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Questions Presented

A Judgment was entered in the Superior Court of Craven County, North Carolina, at New Bern, North Carolina, in a disbarment proceeding wherein petitioner was suspended from the practice of law for a twelve month period and a six month period, running concurrently with the twelve month suspension of time. The Supreme Court of North Carolina affirmed the Judgment of the Superior Court of Craven County in an Opinion which was filed March 22,

1967. See *State Bar* v. *Frazier*, 269 N. C. 625, —— S. E. 2d ——. In the Superior Court of Craven County, as in all prior administrative hearings prior to the hearings in the North Carolina Courts and in the Supreme Court of North Carolina, petitioner raised and pressed the following issues:

1. Did the Superior Court of Craven County err by failing to dismiss the proceeding against petitioner as being beyond respondent's power in regard to disbarment or disciplinary proceedings?

2. Did the Superior Court of Craven County err by failing to dismiss the proceeding against petitioner in view of the denial to petitioner of opportunity to examine members of the Grievance Committee and in view of the limited view which petitioner was permitted to have of minutes of the Grievance Committee?

3. Did the Superior Court of Craven County err by failing to grant petitioner's Motion to Strike portions of respondent's Complaint?

4. Did the Superior Court of Craven County err in its ruling in regard to the admission of evidence?

5. Did the Superior Court of Craven County err in the making of Findings of Fact and Conclusions of Law at variance with those of the North Carolina State Bar?

6. Did the Superior Court of Craven County err by entry of a more severe Judgment upon petitioner's appeal than the Judgment of the Council from whence petitioner had appealed?

The Opinion of the Supreme Court, *ad seriatim*, passed upon each of petitioner's contentions.

Petitioner, throughout the disbarment proceeding against him, consistently maintained, in effect, that (1) the disbarment proceeding against him was grossly unfair, in that, two dissimilar proceedings were fused in such fashion as to render petitioner without real opportunity to make defense; (2) he was denied access to requested information which was necessary for his defense; (3) he was denied the right to confront accusers, and facts were found against him and confirmed upon "raw" hearsay and reports; (4) the proceeding against him involved the unfair requirement that petitioner carry the burden of respondent's case; (5) petitioner was penalized for contesting a civil action against him and brought to disbarment proceedings solely because the jury verdict and judgment in the civil action were against him—all without a finding in said civil action of the facts assumed in respondent's disbarment action. Petitioner painstakingly invoked federal constitutional protection at each appropriate stage of the proceeding and for each of the deprivations described above.[1]

In view of the matter above referred to, the questions presented are as follows:

1. Was there such a fusion of separate and dissimilar disbarment proceedings in the instant case, to wit, a fusion of statutory and judicial proceedings, as to render petitioner without real opportunity to make a defense and as to render the proceeding against him void of procedural due process of law?

2. Was petitioner denied procedural due process by being denied access to information which he sea-

[1] See Assignments of Error before the State Supreme Court, Appendix "G", *infra*.

sonably requested for the purpose of preparing his defense?

3. Was petitioner denied the right to confront accusers and were facts found upon hearsay evidence in a manner contrary to due process of law?

4. Did the disbarment proceeding against petitioner involve the shifting of respondent's burden of proof to petitioner in such manner as to deny to petitioner the due process of law?

5. Was petitioner unconstitutionally penalized by being brought to disbarment proceedings because he had unsuccessfully defended a civil action against him, which involved an allegation of debt only?

Constitutional and Statutory Provisions Involved

This case involves the Due Process Privileges or Immunities, and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. The case also involves the application of North Carolina General Statutes 1-194, which reads as follows:

> "The referee shall make and deliver a report within the time ordered by the Court, to the clerk of the court in which the action is pending. Either party, during the term or upon ten days' notice to the adverse party out of term, may move the judge to review the report, and set aside, modify or confirm it in whole or in part, and no judgment may be entered on any reference except by order of the Judge."

The above quoted statute is made applicable to this proceeding by North Carolina General Statutes 84-28(3)(f), which, in parts relative to this proceeding, reads as follows:

> "For the trial of the person charged before a committee (if trial by a jury is waived) selected in accordance with the foregoing provisions, which trial shall conform as nearly as practicable to the procedure provided by law before referees in references by consent with the right to appeal to the superior court by filing of exceptions with the council and from order or judgment of the council, the entire record shall be filed with the clerk of the superior court of the county in which the person charged resides if he resides within the State, or in Wake County if the person charged does not reside within the State, and thereafter all proceedings in connection with the charge shall be conducted in the superior court in term in accordance with the laws and rules relating to civil actions in which there has been a reference by consent, but neither party shall be entitled to a trial by jury. Both parties shall have the right to appeal to the Supreme Court in accordance with the procedure permitting appeals in civil actions."

All of North Carolina General Statute 84-28(3)(f) is reproduced in the Appendices to the Petition.[2] Applicable Rules of Respondent State Bar are reproduced herein as Appendix "F" of this Petition.

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[2] See Appendix "E".

Statement of Case

Petitioner in this Court was the "appellant" in the Supreme Court of North Carolina, and "respondent" in all tribunals below the State Supreme Court. Respondent herein, the North Carolina State Bar, was "appellee" in the Supreme Court of North Carolina, and "complainant" in all tribunals below the State Supreme Court. Petitioner Reginald Lee Frazier is referred to in this Petition as "petitioner", while the North Carolina State Bar is referred to as "respondent." The Record before the State Supreme Court is on file in this Court and references are made to it as follows: "(R. p. .....)." Exhibits which were before the State Supreme Court have also been filed in this Court and are referred to in the same manner as they were referred to in the Supreme Court of North Carolina.

The instant proceeding began with the service of petitioner with respondent's Complaint on the 17th day of December, 1964, by the Sheriff of Craven County. The Complaint was in thirty-six paragraphs, the last paragraph of which was as follows:

> "The conduct of the said Reginald L. Frazier hereinabove set forth involved willful deceit, fraud, and was otherwise unprofessional; and said conduct was in violation of the laws of the State of North Carolina, particularly G. S. 84-28, subsections (2)b, d, e, and f."

The Prayer, as appears in the Complaint, was as follows:

> "WHEREFORE, Complainant respectfully prays the disciplinary action be administered to Reginald L.

Frazier as the evidence on the hearing warrants; and that the respondent be taxed with all costs in connection with this proceeding; and for such other and further relief as to the Committee seems appropriate" (R. pp. 3 to 12).

Petitioner filed Answer to the Complaint on or about the 14th day of January, 1965, in which petitioner denied all of the material allegations of the Complaint (R. pp. 25 to 38). Petitioner also annexed to his answer six numbered Further Answers and Defenses in which he respectively (1) denied any fraudulent conduct as was alleged in respondent's Complaint, and set up matter in vindication of himself; (2) denied any unprofessional conduct or intentions in talking to Mrs. Hattie McCarter, now deceased, and in recording their conversation, and petitioner set up allegations in vindication of his conversation with Mrs. Hattie McCarter, now deceased, and in vindication of his recording of their conversation; (3) moved to strike matter which petitioner alleged to be evidential, frivolous, conclusions of law, incompetent, relative to inadmissible evidence and highly prejudicial; (4) alleged reasons for a pre-trial adverse examination of the Secretary of the Bar and moved for such examination; (5) moved for a severance of the two causes alleged in the Complaint against petitioner by reason of misjoinder of a cause of action for (a) an alleged fraudulent retention of a client's funds and (b) for a breach of professional ethics in conversing with another attorney's client and in tape recording the conversation for use against the party, and (6) moved for a trial committee to be appointed by the Su-

preme Court of North Carolina pursuant to North Carolina General Statutes 84-28(3) d2.

In response to request by Honorable E. L. Loftin, President of the North Carolina State Bar, the Supreme Court of North Carolina constituted petitioner's Trial Committee at a conference on the 29th day of January, 1965. A pretrial conference was scheduled and held in this cause in New Bern, North Carolina, on the 28th day of May, 1965, for the purpose of ruling upon preliminary motions raised by petitioner's Further Answers and Defenses and including respondent's Motion to Strike paragraph 2 of petitioner's Fourth Further Answer and Defense. After hearing counsel for both sides, the Trial Committee granted petitioner's Motion to Strike paragraphs 13 and 15 of respondent's Complaint and denied the Motion to Strike as to paragraphs 3, 14, 16, 17, 22, 23, 24, 28, 29, 30, 31, 32, 33, 34 and 36. Petitioner excepted to the denials of his Motion to Strike. (Exceptions Nos. 28, 13, 13A, 13B and 20, R. pp. 171, 131, 146.) The Trial Committee allowed respondent's Motion to Strike paragraph 2 of petitioner's Fourth Answer and Defense. The Trial Committee also entered an Order, upon motion of petitioner, to examine adversely the Secretary of the North Carolina State Bar, setting the adverse examination for June 10, 1965, in the City of Raleigh, North Carolina (R. p. 88). The Trial Committee also set the trial of the proceeding at 10:00 a. m. on June 28, 1965, in New Bern, North Carolina.

The adverse examination of the Honorable Secretary of the North Carolina State Bar was held in Raleigh, North Carolina, pursuant to the Order of the Trial Committee (R. p. 82). During this examination, the Honorable Secre-

tary testified that no written and sworn Complaint was ever received by the State Bar in regard to petitioner's conduct and that one, Hattie McCarter, now deceased, never filed a complaint or statement under oath with the State Bar in regard to petitioner (R. pp. 93 and 94); that he discussed the matter with several members of the Craven County Bar and several laymen (R. pp. 92 and 93) but received no sworn statements or complaints in regard to petitioner; that he received copies of Court papers, upon which this proceeding was based, from Bar Councilor Albion Dunn while that action was pending in the Superior Court of Craven County (R. pp. 91 to 94); that he, the Secretary of the North Carolina State Bar, respondent herein, delivered to the Grievance Committee, during its April 1964 meeting, Court papers in the civil action in which petitioner was a defendant after Opinion by the Supreme Court of North Carolina, along with the Opinion of said Court (R. pp. 91 to 104). The transcript of this adverse examination was made a part of the instant Record by the Trial Committee (R. p. 82) and the transcript was incorporated in petitioner's Motion to Quash or Dismiss for Lack of Due Process by Reason of Procedural Irregularities (R. p. 50).

During the adverse examination of the Honorable Secretary and upon advice of counsel, he refused to permit petitioner's counsel to examine the full minutes of the Grievance Committee for the days when petitioner's matter was before the Committee. (Exception 31, R. pp. 105 to 112.)

The trial of the proceeding against petitioner came on for hearing in New Bern, North Carolina, on June 28,

1965 (R. p. 32). Before respondent proceeded with respondent's case, petitioner made the following written and verified motions, which were ruled upon as indicated below:

1. Motion to Quash or Dismiss for lack of Due Process by Reason of Refusal to Disclose Evidence. The Motion was allowed only in a limited fashion and not to the extent and for the purposes stated in said Motion. Petitioner objected and excepted. (Exception #32A, R. pp. 82 and 83.)

2. Motion for Adverse Examination of Members of Grievance Committee. The Motion was denied by the Trial Committee and petitioner excepted. (Exception #33A, R. p. 83.)

3. Motion to Quash or Dismiss for Lack of Due Process by Reason of Procedural Irregularities. The Motion was denied by the Trial Committee. (Exception #34A, R. p. 83.)

4. Renewal of Motions to Strike which were ruled upon at the pre-trial conference of May 28, 1965. (Exceptions #13A, #13B, R. pp. 81 and 83.)

During the presentation of respondent, counsel for respondent offered certain numbered Exhibits into evidence which were received over petitioner's objections. (Exceptions 35 to 67, R. pp. 175 to 189.) The Exhibits were minutes of the Bar Council and Grievance Committee, and the Letter of Notice directed to petitioner. (See Respondent's Exhibits, Exhibits 1 through 4.) Respondent also offered in evidence the entire Record in Civil Action No. 7954, entitled "James Henry White and Wife, Wealthy

White, v. Hattie McCarter and Reginald Lee Frazier, Individually, and Reginald Lee Frazier, Trustee," as respondent's Exhibit 5, including Sub-Exhibits: (a) Complaint; (b) Notice and Summons to petitioner; (c) Notice and Summons to Hattie McCarter; (d) Answer, Cross Action and Counterclaim of Hattie McCarter; (e) Notice and Summons to James Henry White, et ux.; (f) Application for extension of time to file Answer; (g) Answer of petitioner to original Complaint; (h) Reply to cross action, etc., of petitioner; (i) Reply to Cross Actions, etc., of James Henry White, et ux.; (j) Issues with Answers; (k) Judgment signed by Judge Bundy, (l) Judgment of the Supreme Court of North Carolina; (m) Judgment by Judge Hubert E. May. See, also, respondent's Exhibits 5 through 5M in this Court. All of these Exhibits were received over petitioner's objections. (Exceptions 47 to 60, R. pp. 182 to 184.) Respondent's Complaint and the corresponding paragraph or portion of petitioner's Answer to respondent's Complaint (R. pp. 174 to 178). However, respondent offered into evidence paragraphs 10, 14, 16, 17, 22, 23, 24, 27, 29, 31, 32 and 33 of respondent's Complaint and corresponding portions of petitioner's Answer, which only gave qualified admissions of respondent's allegations and referred to designated Further Answers and Defenses annexed to appellant's Answer. See Exceptions 40, 41, 42, 43, 44, 45, 46, 61, 62, 63, 65, 66 (R. pp. 178 to 189). See, also, Complaint and Answer in this proceeding (R. pp. 3 to 38). Petitioner objected to receipt into evidence of this pleading as indicated above herein. At the conclusion of respondent's case, petitioner moved in writing for judgment as of nonsuit or for insufficiency of evidence to prove the allegations. The Motion was not allowed when made and the

Trial Committee reserved ruling upon it. (Exception #14A, R. p. 73.) Petitioner also renewed all Motions made during the trial and all motions made at the pre-trial conference of May 28, 1965. Petitioner offered no evidence (R. p. 83).

On or about the 10th day of January, 1966, petitioner received Notice and copy of the Trial Committee's Report (R. p. 87). The Trial Committee found facts against petitioner in eight numbered Findings of Facts, and, upon such Findings of Facts, made Conclusions of Law against petitioner. In its report the Trial Committee proposed Judgment against petitioner of a twelve (12) months suspension and Judgment against petitioner for the costs of the action.

On or about the 17th day of January, 1966, petitioner filed Exceptions to Report of Trial Committee (R. pp. 127 to 132). Petitioner excepted to each and every finding of fact and conclusion of law of the Trial Committee (Exceptions 1 to 9), and to the action of the Trial Committee in: (1) Overruling petitioner's Motion to Quash or Dismiss for Lack of Due Process by Reason of Refusal to Disclose Evidence (Exception #10); (2) Overruling his Motion for Adverse Examination of Members of the Grievance Committee (Exception #11); (3) Overruling this Motion to Quash or Dismiss for Lack of Due Process by Reason of Procedural Irregularities (Exception #12); (4) Overruling his Motions to strike (Exception #13); (5) Overruling his written Motion for Judgment as of Nonsuit (Exception #14); (6) Failing to grant or rule upon his Motion to Quash or Dismiss by Reason of Racial Discrimination (Exception #15). Other Exceptions of petitioner as made by petitioner during the June 28, 1965, hearing as to reception of evidence, are delineated by the letter "O" in the

copy of Transcript 3 which was attached to the Report of the Trial Committee. These Exceptions are further brought forward in Exceptions 1 to 8 to the Trial Committee's Report.

Petitioner's appeal from the Trial Committee was heard by the Full Bar Council on the 15th day of April, 1966 (R. p. 133). The Council rendered Judgment against petitioner in which it found facts against petitioner and ordered that he be given a reprimand and be taxed with costs (R. pp. 133 to 138). Petitioner appealed to the Superior Court of Craven County and his appeal was heard by Honorable Rudolph Mintz, Judge Presiding, who entered Judgment against petitioner on the 7th day of October, 1966. Upon petitioner's Notice of Appeals of October 13, 1966, the Court made Appeal Entries in which it overruled all of petitioner's Exceptions to the Court's Judgment, to wit, Exceptions numbers 21 through 30 (R. pp. 162 to 174). The Appeal Entries are a part of the Record in this cause.

The Opinion of the Supreme Court of North Carolina was filed as Number 120, March 22, 1967. In its Opinion, the Supreme Court of North Carolina overruled all of petitioner's Exceptions and contentions and affirmed the Judgment of the Superior Court of Craven County, North Carolina.[3]

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[3] See Appendix "A", *infra*. See also *State Bar* v. *Frazier*, 269 N. C. 625, —— S. E. 2d ——.

How the Federal Questions Were Raised and Decided Below

In the Statement of Case of this Petition, petitioner has detailed the raising of his legal objections, all of which were phrased in a constitutional context.[4] The Opinion of the Supreme Court of North Carolina, specifically ruled upon petitioner's constitutional questions, summarized its position in regard thereto in these words:

> "He [petitioner] cites many authorities on unquestionable (but abstract) statements of the law which cannot be argued or debated. No one would deny that every person is entitled to equal protection of the law or that one is entitled to confront his accusers or that hearsay evidence is incompetent and cannot be used to convict.
>
> "But the respondent is confronted with the well recognized principle that it is not difficult to ascertain the law. The difficulty is in applying well established legal rulings to the facts of a particular case. Therein, the respondent fails. The law he quotes is just not pertinent to the facts of this case, for the reason we have stated . . .
>
> "Since the statute provides that the proceedings in the Superior Court shall be in accordance with the laws and rules relating to civil actions in which there has been a reference by consent, the Judge may 'affirm, amend, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee. * * * It is the duty of the judge to

[4] See Assignments of Error, Appendix "G", *infra*.

consider the evidence and give his own opinion and conclusion both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases, use his own faculties in ascertaining the truth, and form his own judgment as to fact and law.' *Anderson* v. *McRae*, 211 N. C. 197, 189 S. E. 639.

"The suspension was within the penalties authorized by the statute and the respondent was ill-advised in appealing from a mere reprimand in view of the overwhelming evidence of his misconduct. Under the statute and all of the decisions, when one appeals or obtains a new trial he runs the risk of loss as well as gain."

The Opinion of the State Supreme Court also ruled upon petitioner's request to view *full* minutes of the Grievance Committee in these words:

"It is possible that the minutes contained references to other complaints against other attorneys, some of which may have been justified. Others may not have been, which would prove nothing. The question here is: Has the *respondent* been guilty of unethical conduct? That other have, or have not been, cannot change the guilt or innocence of Reginald Lee Frazier."

Finally, a reading of the Opinion of the State Supreme Court indicates that the said Court, in its own way, has purported to rule, *ad seriatim*, upon each of petitioner's constitutional questions, as propounded in this Petition.[5]

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[5] See Question Presented, *supra*.

Reasons for Granting the Writ

The instant case presents classic reasons for the granting of the Writ of Certiorari. While no single novel issue may be presented which this Court has not previously ruled upon, the case presents an unbroken chain of constitutional deprivations which culminated in a single, unjust Judgment of disbarment, which Judgment is the product of the state courts' failure to apply the applicable decision of this Court in the many aspects of this case. This fact alone makes the decision below of such variance with constitutional norm as to merit this Court's discretionary jurisdiction upon writ of certiorari.

1. While the disbarment proceeding against petitioner began as a statutory proceeding,[6] it concluded as though it were a judicial proceeding, with the Superior Court Judge displacing the discretion of the Bar Council and substituting that of his own.[7] While this change of the proceeding has "statutory" recognition[8] and was specifically approved by the Opinion of the State Supreme Court, it should be observed that this change has occurred *only because petitioner appealed.* The relevant portion of the

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[6] See Opinion of the State Supreme Court, Appendix "A", where the Court invoked North Carolina General Statutes 84-28 as the statutory basis for the proceeding against petitioner.

[7] See *In Re Burton,* 257 N. C. 534, 126 S. E. 2d 581, where the North Carolina Supreme Court carefully delineated the difference between statutory and judicial disbarment proceedings. The Judgment of the Bar Council was for a reprimand; that of the Superior Court Judge was for suspension for 12 months from law practice.

[8] See North Carolina General Statutes 84-28(3)(f) which is quoted under Constitutional and Statutory Provisions Involved, *supra.*

"enabling" statute upon which the respondent relies is as follows:

> ". . . all proceedings in connection with the charge shall be conducted in the superior court in term in accordance with the laws and rules relating to civil actions in which there is a reference by consent, but neither party shall be entitled to a jury trial by jury . . ." North Carolina General Statutes 84-28 (3)(f).

And North Carolina General Statutes 1-194, which is also set out under Constitutional and Statutory Provisions Involved, *supra*, provides:

> "The referee shall make and deliver a report within the time ordered by the Court, to the clerk of the court in which the action is pending. Either party, during the term or upon ten days' notice to the adverse party out of term, may move the judge to review the report, and set aside, modify or confirm it in whole or in part, and no judgment may be entered on any reference except by order of the Judge." North Carolina General Statutes 1-194.

The change of a proceeding on an appeal was condemned by this Court nearly twenty years ago in *Cole* v. *Arkansas*, 333 U. S. 196, 68 S. Ct. 514, 92 L. Ed. 644, where a conviction was sustained by a state court, on appeal, because the appellate, state court thought that the evidence was sufficient under a charge not made in the trial court. The effort of the legislature to give to the Superior Court *on petitioner's appeal* in a statutory disbarment, the independent, disbarment discretion inherent in the courts (see *In*

Re Burton, supra), falls within the same category as the change involved in the *Cole* case, *supra*. The surprise in this case is even more alarming in view of the circumstance that respondent was granted a Judgment of suspension against petitioner, which it did not seek, but which respondent has vigorously sought to uphold and enforce.[9]

Again, on petitioner's appeal to the Superior Court from the Bar Council's Judgment of "reprimand,"[10] which was heard only on the record made before the Trial Committee and the Bar Council, without right of jury trial or right of introduction of new matter,[11] the substitution of a new and more severe discretion by the appellate tribunal[12] was totally without notice to petitioner and an effective denial of the judicial review which petitioner sought. The right of judicial review of administrative decisions is fundamental in our law and reaches constitutional status where the right to earn a livelihood is involved.[13] To fetter that review with the imposition of a judicial discretion in excess of the discretion of the administrative agency is an uncon-

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[9] The Judgment of the Bar Council was for reprimand. Appendix "C", *infra*. The Judgment of the Superior Court, affirmed by the State Supreme Court, was for suspension. See Appendix "B". Respondent filed a brief in the North Carolina Supreme Court, in support of the Judgment of the Superior Court for suspension. See Appendix "A", *infra*.

[10] See Judgment of the Bar Council, Appendix "C", *infra*.

[11] North Carolina General Statute 84-28(3)(f).

[12] Petitioner appealed from the Bar Council, an administrative agency, to the State Superior Court of Craven County for a judicial review of the Judgment of the Bar Council. See North Carolina General Statute 84-28(3)(f).

[13] See *Wildmer* v. *Committee on Character Fitness*, 373 U. S. 96, 83 S. Ct. 1175, 10 L. ed. 2d 224, where this Court held that denial of the right to practice law could not be sustained upon ex parte statements in absence of a hearing upon character fitness.

stitutional attempt to render the administrative decision "final" and to penalize resort to judicial review.[14] Moreover, that the North Carolina Statute[15] intended to "ham-string" the right of judicial review is apparent from this significant language of the Opinion of the Supreme Court of North Carolina, to wit:

> "The suspension was within the penalties authorized by the statute and the respondent was ill-advised in appealing from a mere reprimand in view of the overwhelming evidence of his misconduct. Under the statute and all of the decisions, when one appeals or obtains a new trial he runs the risk of loss as well as gain."

Finally, without regard to the state of the law upon the question of the power or wisdom of a trial tribunal which

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[14] Compare *Gonzales* v. *United States,* 348 U. S. 407, 75 S. Ct. 409, 99 L. ed. 467. See, also, cases condemning penalties on right of appeal: *Missouri P. R. Co.* v. *Tucker,* 230 U. S. 340, 33 S. Ct. 961, 57 L. ed. 1507; *Chicago, etc. R. Co.* v. *Nye Schneider Fowler Co.,* 260 U. S. 35, 43 S. Ct. 55, 67 L. ed. 115; *Arizona Eastern R. Co.* v. *Head,* 224 P. 1057, 26 Ariz. 259. See, North Carolina General Statutes 143-306 et seq., which provides judicial review over certain administrative agencies but where the Court is not given the discretion to enter a more severe judgment against the party applying for review. See *Louisville etc. R. Co.* v. *Garrett,* 231 U. S. 208, 34 S. Ct. 48, 58 L. ed. 229, which implies the right of judicial review over administrative decisions. Finally, see *Jaffe* v. *State Department of Health,* 135 Conn. 339, 64 A. 2d 330, 6 A. L. R. 2d 664 and *DeMond* v. *Liquor Control Commission,* 129 Conn. 642, 30 A. 2d 547, which declined to interpret state statutes in such manner as to grant to the state Courts the power to substitute the court's discretion for that of administrative agencies. The stated rationale of the above opinions was the avoidance of conflict with "constitutional limitation upon the power of our courts independently to determine administrative matters."

[15] North Carolina General Statutes 84-28(3)(f) as read with North Carolina General Statutes 1-194 therein absorbed.

exacts a heavier penalty upon retrial, it is respectfully submitted that the analogy made in the Opinion of the State Supreme Court is grossly misplaced, inasmuch as, there has been no retrial or reconsideration by the trial tribunal. Compare North Carolina General Statutes 143-315, which deals with other administrative agencies but which specifically protects an applicant for judicial review against the substitution of the judge's discretion.[16]

2. The Opinion of the Supreme Court of North Carolina reveals that petitioner was denied the right to freely inspect and study the minutes of the Grievance Committee of the Bar.[17] Petitioner also requested the right to adversely examine members of the Grievance Committee.[18] The Opinion of the State Supreme Court, as it pertains to these issues, is set out, *supra,* in this Petition.[19] No law is better settled than the principle that due process requires that a defendant have the right and opportunity to prepare his defense.[20]

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[16] See *Clark Equipment Co.* v. *Johnson,* 261 N. C. 269, 134 S. E. 2d 327, where the North Carolina Supreme Court reversed a superior court judgment in which the superior court had substituted its discretion for that of the Tax Review Board.

[17] See Appendix "A", *supra.*

[18] See Report of Trial Committee, Appendix "D", *infra.* Both requests were denied by the Trial Committee and its rulings were affirmed by the Bar Council, the Superior Court and the State Supreme Court.

[19] See How the Federal Questions Were Raised and Decided, this Petition, *supra.*

[20] See *Holt* v. *Virginia,* 381 U. S. 131, 85 S. Ct. 1375; *United States* v. *Rutkin,* 212 F. 2d 641 (3rd Cir. 1954); *Mooney* v. *Holohan,* 294 U. S. 103, 55 S. Ct. 340, 79 L. ed. 741; *Pyle* v. *Kansas,* 317 U. S. 213, 63 S. Ct. 177, 87 L. ed. 214.

3. In the proceedings in the various state tribunals, petitioner was shockingly denied the right to confront an "accuser." Although he was accused of defrauding one Hattie McCarter by the respondent, the fact is beyond traverse that one Hattie McCarter never made a sworn complaint to that effect against petitioner (R. pp. 92 to 94). In the civil action wherein she filed allegations against petitioner for money which she alleged petitioner owed her, she did not hint or allege fraud (Exhibit 5D). It is significant that the instant proceeding did not proceed upon a sworn affidavit as required by the rules of the State Bar.[21] It is also significant that Mrs. Hattie McCarter was alive when respondent filed its complaint against petitioner (R. pp. 92 to 94). See also Record, page 45, paragraph 3. The secretary of respondent testified of having talked to her. In offering her testimony in this proceeding, the respondent made no showing as would authorize reception into evidence of prior recorded testimony in a proper case.

The Opinion of the Court below has attempted to qualify her testimony as admissible prior recorded testimony, in spite of the glaring dissimilarity of issues, by simply saying that the issues were similar.[22] Respondent also introduced into evidence the issues of the Hattie McCarter case, the jury's answers on the verdict, the judgment of the Su-

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[21] See Appendix "F", *infra*, for the Bar Rules. Section 5, subparagraph C(1) and (2) of Article VI seemingly make commencement of a statutory disbarment proceeding wholly dependent upon a "verified complaint." Nevertheless, the Supreme Court of North Carolina has held that a "verified complaint" is not required. See Opinion, below, Appendix "A", *infra*.

[22] For the Hattie McCarter pleading against petitioner, see Exhibit 5D now in this Court. For respondent's pleadings against petitioner, see the Record in this Court, pages 3 to 12.

perior Court and the Opinion of the State Supreme Court upon the appeal in the case.[23]

Petitioner's right to confront accusers and witnesses is protected by the Fourteenth Amendment to the federal constitution. This Court has repeatedly so held.[24] And petitioner's right not to be prejudiced by hearsay reports is equally as well protected by the same constitutional provision.[25]

4. That respondent intended to shift the burden of the instant proceeding to petitioner can be seen by the fact that respondent painstakingly pleaded inadmissible hearsay evidence and hearsay reports, as indicated above. This was done even before Hattie McCarter died. This attempted shift was approved by all of the state tribunals below, insofar as Judgment was rendered against petitioner upon nothing other than hearsay evidence. The Fourteenth Amendment does not allow such an imposition upon a defendant charged as was petitioner.[26]

5. The price which petitioner has paid for failing to prevail in the *White et ux.* v. *Hattie McCarter et al.*, 261 N. C. 362, 134 S. E. 2d 612, was the unfair burden of a disbarment proceeding. Access to the civil courts of the

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[23] Record in this Court, pages 173 to 190.

[24] *Willner* v. *Committee, etc.*, Note 13, *supra*; *Pointer* v. *Texas*, 380 U. S. 40, 85 S. Ct. 1065, 13 L. ed. 2d 923; *Greene* v. *McElroy*, 360 U. S. 474, 79 S. Ct. 1400, 3 L. ed. 2d 1377; *Douglas* v. *Alabama*, 380 U. S. 415, 85 S. Ct. 1074, 13 L. ed. 2d 934.

[25] *Willner* v. *Committee, etc.*, Notes 13 and 24, *supra*.

[26] *Hornsby* v. *Allen*, 326 F. 2d 605 (5th Cir. 1964); *First Unitarian Church of Los Angeles* v. *Los Angeles County*, 357 U. S. 513, 78 S. Ct. 1350, 2 L. ed. 2d 1460.

states has not heretofore been gained by attorneys only upon such a discriminatory and sacrificial basis.[27] The forbearance of the secretary of respondent in awaiting the outcome of the *White* litigation makes it clear that petitioner was to receive a disbarment proceeding, should the courts rule against him in the *White* litigation. The Record before this Court conclusively shows that petitioner was "served" a disbarment proceeding solely and only because of his use of the state civil courts in the *White* case and that the Record in the *White* case was used, in an unadulterated form, to produce the Judgment against petitioner. This was a clear abridgment of petitioner's Privileges and Immunities, as indicated in Note 27 below.

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[27] See the Privileges and Immunities Clause, Amendment Fourteenth to the Federal Constitution. See, *Chambers* v. *Baltimore, etc. R. Co.*, 207 U. S. 142, 28 S. Ct. 34, 52 L. ed. 143. See, Article 6, Clause 2 of the Federal Constitution [the so-called Supremacy Clause]. Compare *Spevak* v. *Kleen*, —— U. S. ——, 87 S. Ct. ——, 17 L. ed. 2d 574, where an attorney was held by this Court, during the Spring, 1967 Term, to have unfetter Fifth Amendment rights as against attempted disbarment for the exercise. See, also, *Garrity* v. *New Jersey*, —— U. S. ——, 87 S. Ct. ——, 17 L. ed. 2d 562.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SAMUEL S. MITCHELL
126½ East Hargett Street
Raleigh, North Carolina

ROMALLUS O. MURPHY
126½ East Hargett Street
Raleigh, North Carolina

MOSES BURT, JR.
213½ West Main Street
Durham, North Carolina

HERMAN L. TAYLOR
Post Office Box 20027
Greensboro, North Carolina

JOHN H. WHEELER
Mechanics & Farmers Bank
Durham, North Carolina

J. LEVONNE CHAMBERS
405½ East Trade Street
Charlotte, North Carolina

EARL WHITTED, JR.
209 South James Street
Goldsboro, North Carolina

CHARLES MORGAN, JR.
American Civil Liberties Union
5 Forsythe Street, N.W.
Atlanta, Georgia

Counsel for Petitioner

MITCHELL & MURPHY
126½ East Hargett Street
Raleigh, North Carolina

Of Counsel

APPENDICES

APPENDIX "A"

Opinion of the Supreme Court of North Carolina

IN THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1967

No. 120—Craven

THE NORTH CAROLINA STATE BAR,

Complainant,

—v.—

REGINALD LEE FRAZIER, Attorney at Law, New Bern, Craven County, North Carolina,

Respondent.

Appeal by respondent at October 1966 Civil Session of Craven Superior Court, before Mintz, J.

At the October 1963 Session of the Superior Court of Craven County an action was tried, entitled as follows:

> "James Henry White and wife, Wealthy White, v. Hattie McCarter, Reginald L. Frazier, Individually, and Reginald L. Frazier, Trustee."

In it the plaintiffs had alleged that they purchased a piece of property from Mrs. Hattie McCarter for $1250, of which $250 had been paid at the time of the conveyance and the balance of $1000 was secured by a note and deed of trust. The respondent acted as defendant's attorney throughout the transaction, named himself trustee in the deed of trust, and his name was inserted in the note as co-payee with Mrs. McCarter. The plaintiffs alleged that they had made 13

payments of $50 each to Frazier, and that the balance was then $350. They further alleged that they had sought to obtain canceliation of the deed of trust upon payment of $350, and that Mrs. McCarter had refused to accept it. The action was brought to obtain cancellation of the deed of trust upon that payment.

Mrs. McCarter in her answer denied that the plaintiffs had made the payments claimed and in a cross-action asserted that if the payments had been made to Frazier he had failed to account to her for them, and sought judgment over against him for the amount received by him. Frazier denied receiving the payments alleged, and at the trial the jury answered the issues quoted below as follows:

> "Was the defendant, Reginald L. Frazier, acting as attorney and agent of the defendant, Hattie McCarter, in connection with the sale of the lots in question to the plaintiffs, and the collection of the money therefor? Answer: Yes.
>
> "In what amount, if any, are the plaintiffs White indebted to the defendant Hattie McCarter? Answer: $350.00.
>
> "In what amount, if any, is the defendant Hattie McCarter entitled to recover of the defendant Reginald L. Frazier on her cross-action and counterclaim, as alleged? Answer: $428.00."

Judgment was signed upon the verdict and the defendant Frazier appealed to the North Carolina Supreme Court. The judgment was affirmed as reported in 261 N. C. 362, 134 S. E. 2d 612.

The North Carolina State Bar received information about the case and instituted this action against Frazier seeking appropriate punishment for his alleged unethical

and improper conduct. The lengthy complaint setting forth the above facts with full details and with exhibits appended which included the note, the deed of trust, and an alleged tape recording of a conversation between Respondent Frazier and Mrs. McCarter was served upon him. The complaint was verified by E. L. Cannon, Secretary of the North Carolina State Bar.

Frazier filed an answer partially admitting and partially denying the allegations of the complaint, and setting out as defenses his lack of experience in the practice of law; that the transaction in which he drew the note and deed of trust occurred when he had been practicing law less than six months; that his name had been placed in the note by his secretary and without his knowledge; that he immediately remitted to Mrs. McCarter each payment made by the Whites, which totaled $650.00, but that Mrs. McCarter had failed to give him receipts for the payments made to her; that the action of the State Bar was due to the ill will of the Secretary of the Bar toward him and "is a personal vendetta solely by reason of the ill will which the Secretary harbors against this Respondent". He later filed a motion to quash or dismiss the proceeding by reason of racial discrimination.

Respondent requested that a trial committee be appointed by the Supreme Court pursuant to. G. S. 84-28 (3) d 2. A committee of three highly respected attorneys, one of whom was a member of the respondent's race, was appointed by the Chief Justice, who heard the evidence in the case. In the civil action Mrs. McCarter had testified *under oath* and *was cross-examined* by Frazier's attorney (Frazier being *present* at the time) that she got $23 through Frazier three or four times, and $50 three or four times, and that she never received any money directly from the Whites. The Committee reported their findings with appro-

priate details, concluding as a matter of law that the respondent is guilty of corrupt or unprofessional conduct. They thereupon unanimously ordered that Frazier be suspended from the practice of law for a period of 12 months.

Frazier appealed to the Full Council of the State Bar which, after considering the evidence, briefs, and oral argument, overruled the respondent's exceptions to the significant findings of fact made by the Committee, made full findings of fact and held that the respondent was guilty of unethical conduct, and ordered that he be given a reprimand by the Council of the North Carolina State Bar at such time and place so designated by the Council, and that respondent pay the cost connected with the proceeding.

The respondent filed exceptions to the Resolution of the Council and appealed to the Superior Court of Craven County.

The appeal was heard in Superior Court by Hon. Rudolph Mintz, presiding Judge, at the October 1966 Civil Session of Craven Superior Court. It was heard on the full record of the previous proceedings before the Trial Committee and the Council and respondent's exceptions and assignments of error thereto, and upon the briefs and argument of counsel for Complainant and Respondent.

Judge Mintz made full findings of fact which in effect approved and affirmed the findings previously made by the Committee of the State Bar Council and concluded as a matter of law that the respondent is guilty of corrupt or unprofessional conduct in the following particulars:

"(a) That the Respondent did detain without a bona fide claim thereto, money collected in his capacity as attorney for Hattie McCarter in the sum of $428.00, contrary to the provisions of G. S. 84-28 (2)b.

"(b) That the conduct of Respondent in conferring with Hattie McCarter, done without the permission or knowledge of her then counsel, and recording without her permission or knowledge, the conversation, during the pendency of the aforesaid Civil Action No. 7954, was reprehensible, inexcusable, and in violation of the Canons of Ethics, and more particularly Canon 9 as promulgated and adopted by the Council of the North Carolina State Bar, and a flagrant violation of his oath as an attorney."

The Court thereupon ordered that the respondent be suspended from the practice of law for a period of 12 months for his corrupt and unprofessional conduct in detaining without a bona fide claim thereto money collected in his capacity as attorney for Hattie McCarter; and also that he be suspended from the practice of law for a period of six months for his corrupt and unprofessional conduct in violating Canon 9 of the Canons of Ethics of the North Carolina State Bar, the said suspensions to run concurrently, and that the respondent pay the costs.

The defendant noted exceptions to Judge Mintz' findings of fact, conclusions of law and judgment, and thereupon appealed to the Supreme Court.

ROBERT D. ROUSE, JR.
For Complainant Appellee

MITCHELL & MURPHY,
MOSES BURT, JR.
HERMAN L. TAYLOR
JOHN H. WHEELER
J. LEVONNE CHAMBERS
LISBON C. BERRY, JR.
EARL WHITTED, JR.
CHARLES MORGAN, JR.
For Respondent Appellant

Pless, J.: G. S. 84-28 in pertinent part is as follows:

"Discipline and Disbarment. — The council or any committee of its members appointed for that purpose, or designated by the Supreme Court,

(1) Shall have jurisdiction to hear and determine all complaints, allegations, or charges of malpractice, corrupt or unprofessional conduct, or the violation or professional ethics, made against any member of the North Carolina State Bar;

(2) May administer the punishments of private reprimand, suspension from the practice of law for a period not exceeding twelve months, and disbarment as the case shall in their judgment warrant, for any of the following causes:

a. Commission of a criminal offense showing professional unfitness;

b. Detention without a bona fide claim thereto of property received or money collected in any fiduciary capacity;

c. Soliciting professional business;

d. Conduct involving willful deceit or fraud or any other unprofessional conduct;

e. Detention without a bona fide claim thereto of property received or money collected in the capacity of attorney;

f. The violation of any of the canons of ethics which have been adopted and promulgated by the council of the North Carolina State Bar."

The Canons of Ethics of the North Carolina State Bar, Art. X, Canon 9, is as follows:

"A lawyer should not in any way communicate upon the subject or controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

The respondent was found guilty of violating both the above, and appropriate punishment has been ordered. He groups his exceptions and assignments of error under five arguments.

The first is that the proceedings were at all times unlawful and in excess of the jurisdiction of the North Carolina State Bar and the Craven County Superior Court. However, the provisions quoted above give the State Bar jurisdiction in such cases and provide for punishment.

G. S. 84-28 (3) f provides that an appeal from the proceedings and judgment of the Council may be had to the Superior Court of the County in which the person charged resides if he resides within the State, and that "all proceedings in connection with the charge shall be conducted in the Superior Court in term in accordance with the laws and rules relating to civil actions in which there has been a reference by consent, but neither party shall be entitled to a trial by jury. Both parties shall have the right to appeal to the Supreme Court in accordance with the procedure permitting appeals in civil actions".

This argument and the exceptions relating thereto are not sustained.

He complains that no layman, and especially the person whom he defrauded, if the jury verdict is correct, made any complaint against him. This is not required. The object

of the regulations is to protect the public from unethical conduct by one vested with an attorney's license. A well educated lawyer, whose position and achievement bring trusting persons to his office in a search of guidance and protection, has the duty of conducting himself with the highest degree of honor, integrity and ethics. The duty of patrolling the conduct of licensed attorneys is placed on the Council of the State Bar, and there are no requirements that it shall be limited to any particular source for its information or instigation of proceedings.

Further complaint is made that the respondent was denied the right to freely inspect, use and study the minutes of the Grievance Committee of the Bar. He was offered the right to inspect the minutes as they related to him, but he replied that "If we cannot have *all* (emphasis ours) the minutes, we do not care to see what we have before us".

On several occasions the respondent's attorneys asked for the minutes "in order that we could compare what was done in Mr. Frazier's case and what was done in the other cases".

At another time they said: "We want to see what disciplinary actions were taken on that date; what type of actions were taken; who the names of the attorneys were, and so that we can inquire what the bases of them is so we can determine whether or not Frazier is being accorded the same protection and the same treatment as any other lawyer."

Also they said: "We have alleged that this man is seeking equal protection of the laws and the equal treatment and the comparison of the treatment of this defendant with other defendants who were discussed at the time of the Bar meetings."

In response to these motions and statements, counsel for the Bar tendered certified copies of the minutes as they relate to Frazier and stated that in his opinion he would not have legal authority to provide the respondent with certified copies of the minutes in their entirety. He said: "It may be that you do have the right to examine the contents of those records in their entirety; if so, I would not want to voluntarily agree. I would prefer that you have an appropriate subpoena *duces tecum* issued and that an appropriate court official order the contents of those minutes disclosed * * * I will now offer to permit a representative of your counsel to examine those minutes as they relate to your client." The respondent declined the offer and did not pursue the suggestion that he seek a subpoena *duces tecum.*

It is possible that the minutes contained references to other complaints against other attorneys, some of which may have been justified. Others may not have been, which would prove nothing. The question here is: Has the *respondent* been guilty of unethical conduct? That others have, or have not been, cannot change the guilt or innocence of Reginald Lee Frazier.

The respondent also excepts to the refusal to strike a number of allegations in the complaint against him. A careful perusal of all of them shows that they are relevant and competent in stating the position of the Bar Council and in informing the respondent of the charges against him.

Argument IV of the respondent's brief relates to "Reception in evidence of hearsay evidence pertaining to a civil action in which parties, issues and proceedings are dissimilar" to those in the instant case. While the parties are not technically the same, the inquiry is entirely based on the

alleged unethical conduct of the respondent in his dealings with his aged and illiterate client, Mrs. Hattie McCarter. So was the civil action in which he was found by the jury to have withheld the money of his client while acting as her agent and attorney.

Mrs. McCarter died after the trial of the civil case and before the hearings of the Committee. Her evidence at the trial is clearly admissible in this proceeding. It meets all the requirements so clearly and concisely stated in Stansbury on Evidence, 2d Ed. Sec. 145, regarding "the testimony of a witness at a former trial or other judicial hearing (which) may be given in evidence at a subsequent trial, whether civil or criminal, if it complies with all of the following conditions:

"(1) If the witness has since died, or become incapacitated by insanity or illness, or has removed from the jurisdiction or has otherwise become unavailable to testify as a witness at the present trial.

"(2) If the proceeding at which he testified was a former trial of the same cause, or a preliminary stage of the same trial, or the trial of another cause involving the same issue and subject matter as the one to which his evidence is directed at the present trial.

"(3) If the parties at the former trial were the same as those at the present trial, or in privity with them, or if the situation was such that the party against whom the evidence was then offered had the same opportunity and motive to cross-examine the witness as the party against whom it is now offered has at the present trial."

In view of this we hold that the other features of the respondent's argument IV necessarily fail.

In argument V the respondent largely recapitulates and repeats the foregoing conditions, all of which have been considered and rejected.

The respondent's violation of Canon 9 is hardly contested. He admitted that, while the civil action was pending and Mrs. McCarter was represented by other counsel, he not only "communicated upon the subject or controversy", but made a tape recording of his conversation with her, without her knowledge.

Frazier testified that she came to his office after the civil action had been instituted for her by the firm of Ward & Ward, attorneys of New Bern, and that he discussed the case with her. From the recording it is seen that he told Mrs. McCarter that "We have got to get the Whites straightened out about those lots"; that Mrs. McCarter said she had not received the money that the Whites claimed they had given her—"they have not give me the money". He asked her if she believed they had hoodwinked her into something, to which she replied that she knew they did, and that she had told Frazier they "would hoodoo him". She also said that Frazier had authority to receive the money for her; that he was her lawyer; that the Whites were supposed to pay Frazier the money and he was supposed to bring it to her, and that he did. Frazier asked her the following question: "I just wanted to establish that you came to me and hired me as your lawyer to go by and pick up the money for you and that I would bring the money to your house when I picked it up when they did pay me?" She answered: "When they did pay and give it to you." (It also appears that Frazier communicated with her at another time in regard to the matter).

The Secretary of the Bar testified, without objection, that after the civil trial of *White* v. *McCarter* "I talked to

Hattie McCarter and she advised me that everything she stated was true and that Frazier had taken her money and, further, that he had been to see her and that he had asked her not to do anything in connection with this, and he said he was going to lose his license and that he was going to New York".

Judge Mintz made full and complete findings which in effect approved and affirmed the findings and conclusions of the State Bar Council, and made additional findings as follows:

"IX. That Reginald Lee Frazier detained without a *bona fide* claim thereto money in the sum of $428.00 belonging to Hattie McCarter and collected in his capacity as attorney.

"X. That the Respondent violated the laws of the State of North Carolina, and specifically G. S. 84-28 (2) b in the collection and retaining of the sum of $428.00 for Hattie McCarter in his capacity as attorney.

"XI. That the Respondent violated the Canons of Ethics which have been promulgated and adopted by the Council of the North Carolina State Bar, and specifically Canon No. 9 in conferring with Hattie McCarter during the pendency of the aforesaid Civil Action No. 7954.

"That upon the foregoing findings of fact, and the evidence offered in this proceeding, the Court concludes as a matter of law that the Respondent is guilty of corrupt or unprofessional conduct in the following particulars:

"(a) That the Respondent did detain without a *bona fide* claim thereto, money collected in his capacity as attorney for Hattie McCarter in the sum of $428.00 contrary to the provisions of G. S. 84-28 (2) b.

"(b) That the conduct of Respondent in conferring with Hattie McCarter, done without the permission or knowledge of her then counsel, and recording without her permission or knowledge, the conversation during the pendency of the aforesaid Civil Action No. 7954, was reprehensible, inexcusable, and in violation of the Canons of Ethics, and more particularly Canon 9 as promulgated and adopted by the Council of the North Carolina State Bar, and a flagrant violation of his oath as an attorney."

He thereupon adjudged that Frazier be suspended from the practice of law for a period of 12 months "for his corrupt and unprofessional conduct in detaining without a *bona fide* claim thereto money collected in his capacity as attorney for Hattie McCarter", and that he be suspended from the practice of law for 6 months "for his corrupt and unprofessional conduct in violating Canon 9 of the Canons of Ethics of the North Carolina State Bar"; with the suspensions to run concurrently and the respondent pay the costs.

The respondent's complaint that the judgment of Judge Mintz in which the punishment from which he had appealed was greater than that imposed by the Council cannot avail him.

Since the statute provides that the proceedings in the Superior Court shall be in accordance with the laws and rules relating to civil actions in which there has been a reference by consent, the Judge may "affirm, amend, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee. * * * It is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in

other cases, use his own faculties in ascertaining the truth, and form his own judgment as to fact and law." *Anderson* v. *McRae,* 211 N. C. 197, 189 S. E. 639.

The suspension was within the penalties authorized by the statute and the respondent was ill-advised in appealing from a mere reprimand in view of the overwhelming evidence of his misconduct. Under the statute and all of the decisions, when one appeals or obtains a new trial he runs the risk of loss as well as gain. In *S.* v. *White,* 262 N. C. 52, 136 S. E. 2d 205, the defendant was convicted of robbery and was sentenced to serve ten years. He later was granted a new trial at his request and was again found guilty as charged in the indictment. He was thereupon ordered imprisoned for a term of not less than 12 nor more than 15 years. He took exception to the lengthier sentence in the second case, and Parker, J. (now C. J.), said: "Defendant having been convicted of the same offense on the second trial on the same indictment, a heavier sentence may be imposed than was imposed on the first trial." He quoted from *Hobbs* v. *State,* 231 Md. 533, 191 Atl. 2d 238, Cert. den., 375 U. S. 914, 11 L.Ed. 2d 153: " 'In asking for and receiving a new trial, appellant must accept the hazards as well as the benefits resulting therefrom.' " We quote further from *S.* v. *White, supra,* "In *Bohannon* v. *Dist. of Columbia,* 99 Atl. 2d 647 * * * the Court accurately said: 'We readily appreciate appellant's feeling that the obtaining of a new trial after the first conviction was a hollow victory, since it resulted in a second conviction and a fine ten times as much as the one first imposed. This, however, was a risk he took, and the second Judge was not bound to impose the same fine given by the first Judge.' "

Later on, Chief Justice Parker said: "When defendant, at his request, obtained a new trial hoping to be set free

or obtain a lighter sentence, he accepted the hazard of receiving a heavier sentence if convicted at the new trial of the same identical offense, and this is not a denial to him of any constitutional right as contended by him."

In *S.* v. *Correll,* 229 N. C. 640,.50 S. E. 2d 717, the defendant was convicted of manslaughter and given a sentence of 3 to 5 years in State Prison. Upon appeal he was awarded a new trial, in which he was convicted of murder in the second degree and received a prison sentence of not less than 7 nor more than 10 years. Upon his appeal he took exception to his conviction of a higher offense and the imposition of a longer prison sentence. The Court overruled these exceptions and affirmed the later judgment.

While the cases cited deal with criminal cases, they are all the more applicable to this case inasmuch as the Court would deal with the imprisonment of a citizen with even more care and consideration than it would give one not involving as great penalty. The Judge was of opinion, and justly so, that the reprehensible conduct, or misconduct, of the respondent justified more severe measures than a mere reprimand and suspended his right to practice law for 12 months. That cannot be called cruel and unusual or unjustified.

The respondent in reply to the charges made against him, in effect, entered a plea of confession and avoidance. While he did not admit his guilt, it was conclusively shown.

However, he seeks to avoid responsibility on the following unimpressive grounds. He claims he was inexperienced and had been practicing law less than six months when he drew the papers for Mrs. McCarter and the payments to him, for her, began. Inexperience in the legal profession cannot excuse what amounts to embezzlement. Dishonesty and breach of trust may be committed by anyone, and no

person needs a law license or experience in the practice of law to know that dishonesty and crookedness are wrong.

He cites many authorities on unquestionable (but abstract) statements of the law which cannot be argued or debated. No one would deny that every person is entitled to equal protection of the law, or that one is entitled to confront his accusers, or that hearsay evidence is incompetent and cannot be used to convict.

But the respondent is confronted with the well-recognized principle that it is not difficult to ascertain the law. The difficulty is in applying well established legal rulings to the facts of a particular case. Therein, the respondent fails. The law he quotes is just not pertinent to the facts of this case, for the reasons we have stated.

He complains that he has been singled out for prosecution; that others have been guilty of unethical conduct who have not been punished or who have not received as severe punishment as did he, and, in effect, because all have not been prosecuted and punished, he should not be.

It is possible that others have not been apprehended, but if in the effort to enforce a high standard of conduct and ethics the Council should be required in each case to show the facts and results in every similar case it had investigated, the inquiry would go on endlessly.

This is equivalent to the position that until all murderers, robbers, and other criminals have been convicted and punished, the remainder, even though their guilt is clearly established, should not be either. The fallacy of this position is apparent from a statement of his contentions.

In his trials the respondent adopted as his tactics the old game of "trying the Solicitor". Upon the theory that the best defense is a good offense the respondent set out to try the State Bar, its Council, its Secretary, and even

the completely unconnected North Carolina Bar Association. He should not be surprised that he, rather than they, was tried.

And finally he seeks to establish that he is being persecuted because of his race. Completely ignoring that the object of his dishonesty and greed and the one whom the Court in the civil action protected, was an aged, trusting and uneducated old lady—of his own race!

In the proceedings and judgment below there is no error.

Affirmed.

APPENDIX "B"

Judgment of the Superior Court of Craven County

IN THE SUPERIOR COURT

NORTH CAROLINA
CRAVEN COUNTY

THE NORTH CAROLINA STATE BAR,

Complainant,

—v.—

REGINALD LEE FRAZIER, Attorney at Law, New Bern, Craven County, North Carolina,

Respondent.

THIS CAUSE came on to be heard and was heard before the undersigned, Rudolph I. Mintz, Judge of the Superior Court, assigned to hold the Courts of the Third Judicial District for the Fall Sessions of 1966 at the October Civil Session of the Craven County Superior Court upon the appeal and exceptions filed by the Respondent to the findings, conclusions, and judgment of the North Carolina State Bar Council, sometimes hereinafter referred to as the "Council," and the exceptions brought forward by the Respondent to the findings, conclusions, and judgment of the Trial Committee. This cause was heard before the undersigned on the record, including: orders; pleadings; motions; Complainant's evidence and exhibits introduced at the hearing before the Trial Committee; findings, conclusions, and recommendations of Trial Committee, and

Respondent's exceptions thereto; findings, conclusions, and judgment of the Council, and Respondent's exceptions and assignments of error thereto; and upon the briefs and argument of counsel for Complainant and Respondent.

The Court takes notice that upon stipulation of the parties the aforesaid record and briefs of counsel were furnished to the Court for study and consideration prior to the date set for this hearing.

After reading and giving due consideration to the entire record and briefs of counsel, and after hearing oral arguments, the Court affirms the following findings of fact made by the Council of the North Carolina State Bar and entered on April 15, 1966:

I. The North Carolina State Bar on December 14, 1964, filed a complaint against Reginald Lee Frazier, Attorney at Law, New Bern, Craven County, North Carolina, alleging that the Respondent while acting as Trustee in a deed of trust and as attorney at law did unlawfully and wilfully—

(a) detain without a bona fide claim thereto money collected in his capacity as attorney;

(b) engage in conduct involving wilful deceit and fraud and other unprofessional conduct;

(c) detain without bona fide claim thereto property and money collected in a fiduciary capacity;

(d) did violate the Canons of Ethics which have been adopted and promulgated by the Council of The North Carolina State Bar.

II. That the Respondent passed his Bar examination August 5, 1960 and was duly admitted to The North Carolina Bar and in the month of June 1961 was engaged in the practice of law in Craven County, North Carolina.

III. That in June 1961 Respondent prepared a deed of trust from James Henry White and wife, Wealthy White, to secure the payment of a $1,000.00 note payable to Hattie McCarter, party of the third part in said deed of trust, and the note prepared and secured thereby was made payable to "Hattie McCarter and Reginald L. Frazier"; that the act of Respondent in making himself one of the payees in the note appears to have been due to inexperience of Respondent at the time in preparation of deeds of trust and notes.

IV. That the Respondent collected payments on said note from time to time.

V. That subsequently James Henry White and wife, Wealthy White, instituted action in the Superior Court of Craven County, North Carolina, the same being Civil Action No. 7954, against Hattie McCarter and Reginald Lee Frazier, individually, and Reginald Lee Frazier, Trustee, alleging in substance that they owed to Hattie McCarter balance of $350.00 on said note, without interest; that she refused to accept it in settlement of the deed of trust and seeking cancellation of the deed of trust upon the payment of $350.00 in cash. Hattie McCarter filed answer in said action and alleged as a basis of a cross-action against the Respondent that she recover of the Respondent, Reginald Lee Frazier, such monies as may be shown to the Court as having been paid to him by the plaintiffs in that action for the defendant, Hattie McCarter. The Respondent, Reginald Lee Frazier, filed answer to the cross-action of Hattie McCarter, denying the counter-claim and cross-action of Hattie McCarter. Upon the trial of the foregoing action the following issues were submitted to the jury and answered by the jury as follows:

QUESTION: Was the defendant, Reginald L. Frazier, acting as attorney and agent of the defendant, Hattie McCarter, in connection with the sale of the lots in question to the plaintiffs, and the collection of the money therefor?

ANSWER: Yes.

QUESTION: In what amount, if any, are the plaintiffs, White, indebted to the defendant, Hattie McCarter?

ANSWER: $350.00. Without interest.

QUESTION: In what amount, if any, is the defendant, Hattie McCarter, entitled to recover of the defendant, Reginald L. Frazier, on her cross-action and counterclaim, as alleged?

ANSWER: $428.00.

The Respondent appealed from the judgment of the Superior Court of Craven County, North Carolina, entered upon the trial of the foregoing action, and the Court in the opinion reported in 261 NC 362 stated in part as follows:

"McCarter's cross-action against Frazier raises the simple question whether Frazier had fully accounted for the $900.00 collected by him and, if not, the amount of his default. The Court placed the burden upon McCarter to satisfy the jury by the greater weight of the evidence that Frazier is indebted to her and the amount of the indebtedness. Of this, Frazier is in no position to complain. The purport of his pleadings is that he collected $900.00 for McCarter and paid it to her in full. Payment is an affirmative plea and the burden of showing payment is on the one who relies on payment as a defense."

The Court found no error in the trial in Superior Court.

VI. That during the pendency of the foregoing Civil Action No. 7954 and after cross-action was asserted by Hattie McCarter against the Respondent, the Respondent had a conversation with Hattie McCarter in his office concerning the subject matter of the pending civil action and which conversation was recorded without the knowledge of Hattie McCarter. This conversation is attached to the complaint filed and marked "Exhibit C."

VII. That Reginald Lee Frazier was acting as attorney and agent of the said Hattie McCarter in connection with the sale of the lots to the plaintiffs in that action and in the collection of the money therefor.

And the Court makes additional findings of fact as follows:

VIII. That the conversation aforesaid was recorded without the permission or knowledge of Hattie McCarter; that at the time of said conversation the said Hattie McCarter was represented by counsel; and said conversation was had without the knowledge or consent of said counsel.

IX. That Reginald Lee Frazier detained without a bona fide claim thereto money in the sum of $428.00 belonging to Hattie McCarter and collected in his capacity as attorney.

X. That the Respondent violated the laws of the State of North Carolina, and specifically G. S. §4-28(2)b in the collection and retaining of the sum of $428.00 for Hattie McCarter in his capacity as attorney.

XI. That the Respondent violated the Canons of Ethics which have been promulgated and adopted by the Council of the North Carolina State Bar, and specifically Canon

No. 9 in conferring with Hattie McCarter during the pendency of the aforesaid Civil Action No. 7954.

That upon the foregoing Findings of Fact, and the evidence offered in this proceeding, the Court concludes as a matter of law that the Respondent is guilty of corrupt or unprofessional conduct in the following particulars:

(a) That the Respondent did detain without a bona fide claim thereto, money collected in his capacity as attorney for Hattie McCarter in the sum of $428.00, contrary to the provisions of G. S. 84-28 (2)b.

(b) That the conduct of Respondent in conferring with Hattie McCarter, done without the permission or knowledge of her then counsel, and recording without her permission or knowledge, the conversation during the pendency of the aforesaid Civil Action No. 7954, was reprehensible, inexcusable, and in violation of the Canons of Ethics, and more particularly Canon 9 as promulgated and adopted by the Council of the North Carolina State Bar, and a flagrant violation of his oath as an attorney.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That each exception by the Respondent to the findings, conclusions, and judgments of the North Carolina State Bar Council and Trial Committee in this cause insofar as the findings, conclusions, and judgments of the said Council and Trial Committee do not conform to this judgment are sustained. Each exception by Respondent to the findings, conclusions, and judgments of the Council and Trial Committee in this cause insofar as the findings and conclusions of said Council and Trial Committee do conform to this judgment are overruled.

2. That pursuant to General Statutes Article 4, Chapter 84, the Respondent, Reginald Lee Frazier, be and he is hereby suspended from the practice of law for a period of twelve (12) months, next following the date of the filing of this judgment, for his corrupt and unprofessional conduct in detaining without a bona fide claim thereto money collected in his capacity as attorney for Hattie McCarter as set forth above.

3. That Reginald Lee Frazier be and he is hereby suspended from the practice of law for a period of six (6) months following the date of the filing of this judgment for his corrupt and unprofessional conduct in violating Canon 9 of the Canons of Ethics of the North Carolina State Bar, as set forth above.

4. That said suspensions shall run concurrently.

5. That the Respondent shall pay the costs of this action to be taxed by the Council of the North Carolina State Bar and the Clerk of the Superior Court of Craven County.

6. That a certified copy of this judgment be forwarded to the Clerk of the Supreme Court of North Carolina and to the offices of the North Carolina State Bar.

Done at New Bern, North Carolina, this the 7th day of October, 1966.

RUDOLPH I. MINTZ
Judge Presiding

NORTH CAROLINA
CRAVEN COUNTY

I, W. B. FLANNER, Clerk of the Superior Court in and for said state and county aforesaid, do hereby certify that the foregoing and annexed is a true and correct copy of Judgment THE NORTH CAROLINA STATE BAR vs. REGINALD LEE FRAZIER, Attorney at Law, New Bern, Craven County, North Carolina as the same is taken from and compared with the original now on file in the office of the Clerk of Superior Court of Craven County.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court.

Done in office at New Bern, North Carolina, this the 11 day of October, 1966.

W. B. FLANNER, *Clerk Superior Court*
Ex Officio Judge of Probate

By: JOANNA W. AVERETTE
(Deputy) Clerk Superior Court

APPENDIX "C"

Judgment of the Full Council of the North Carolina State Bar

BEFORE THE COUNCIL OF THE NORTH CAROLINA STATE BAR

NORTH CAROLINA
CRAVEN COUNTY

THE NORTH CAROLINA STATE BAR,

Complainant,

—v.—

REGINALD LEE FRAZIER, Attorney at Law, New Bern, Craven County, North Carolina,

Respondent.

THIS MATTER coming on to be heard before the Council of The North Carolina State Bar at its regular quarterly meeting on the 15th day of April, 1966, and it appearing to the Council upon the motion of the attorney for the Complainant that at the hearing of this proceeding a transcript of a recorded conversation between the Respondent and one Hattie McCarter concerning the subject matter of a then pending civil action No. 7954 of a cross-action between Hattie McCarter and the Respondent was introduced by Complainant as evidence in this disciplinary proceeding. This transcript was also identified as Exhibit "C" of the Complainant's Complaint. The Council was informed that in preparing the copies of the exhibits for consideration by the Council copies of the recorded transcript was left out

through error, and requested that it be added as an exhibit of the evidence considered at the hearing in this proceeding. It was pointed out that the Exhibit "C" was attached to the Complaint which was a part of the record proper which each member of the Council had before it for consideration of this proceeding. The record was corrected to include the copy of the transcript of the recorded conversation as one of the exhibits introduced at the hearing. And this proceeding being heard on the Report of the Trial Committee appointed by the Supreme Court of North Carolina, and its Findings, Conclusions and Recommendations, and the briefs and oral argument of counsel for the Complainant and counsel for the Respondent, and the Exceptions of the Respondent to the Report of the Trial Committee, and upon consideration of the entire record, the following resolution was adopted:

"RESOLVED: The Council concludes that the Respondent's Exceptions, designated as 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15, filed before the Council of The North Carolina State Bar to the Findings, Conclusions, and Recommendations of the Trial Committee appointed by the Supreme Court should be, and they are hereby overruled and denied.

"RESOLVED: The Council makes the following Findings of Fact:

"I. That the North Carolina State Bar on December 14, 1964, filed a complaint against Reginald Lee Frazier, Attorney at Law, New Bern, Craven County, North Carolina, alleging that the respondent while acting as trustee in a deed of trust and as attorney at law did unlawfully and wilfully—(a) detain without a bona fide claim thereto money collected in his capac-

ity as attorney; (b) engage in conduct involving wilful deceit and fraud and other unprofessional conduct; (c) detain without bona fide claim thereto property and money collected in a fiduciary capacity; (d) did violate the Canons of Ethics which have been adopted and promulgated by the Council of The North Carolina State Bar.

"II. That the respondent passed his Bar examination August 5, 1960, and was duly admitted to the North Carolina Bar and in the month of June, 1961, was engaged in the practice of law in Craven County, North Carolina.

"III. That in June, 1961, respondent prepared a deed of trust from James Henry White and wife, Wealthy White, to secure the payment of a $1000.00 note payable to Hattie McCarter, party of the third part in said deed of trust, and the note prepared and secured thereby was made payable to 'Hattie McCarter and Reginald L. Frazier'; that the act of respondent in making himself one of the payees in the note appears to have been due to inexperience of respondent at the time in preparation of deeds of trust and notes.

"IV. That the respondent collected payments on said note from time to time.

"V. That subsequently James Henry White and wife, Wealthy White, instituted action in the Superior Court of Craven County, North Carolina, the same being Civil Action No. 7954, against Hattie McCarter and Reginald Lee Frazier, individually, and Reginald Lee Frazier, trustee, alleging in substance that they owed to Hattie McCarter balance of $350.00 on said

note, without interest; that she refused to accept it in settlement of the deed of trust and seeking cancellation of the deed of trust upon the payment of $350.00 in cash. Hattie McCarter filed answer in said action and alleged as a basis of a cross-action against the respondent that she recover of the respondent, Reginald Lee Frazier, such monies as may be shown to the Court as having been paid to him by the plaintiffs in that action for the defendant, Hattie McCarter. The respondent, Reginald Lee Frazier, filed answer to the cross-action of Hattie McCarter, denying the counterclaim and cross-action of Hattie McCarter. Upon the trial of the foregoing action the following issues were submitted to the jury and answered by the jury as follows:

"QUESTION: Was the defendant, Reginald L. Frazier, acting as attorney and agent of the defendant, Hattie McCarter, in connection with the sale of the lots in question to the plaintiffs, and the collection of the money therefor?

"ANSWER: Yes.

"QUESTION: In what amount, if any, are the plaintiffs, White, indebted to the defendant, Hattie McCarter?

"ANSWER: $350.00. Without interest.

"QUESTION: In what amount, if any, is the defendant, Hattie McCarter, entitled to recover of the defendant, Reginald L. Frazier, on her cross-action and counterclaim, as alleged?

"ANSWER: $428.00.

"The respondent appealed from the judgment of the Superior Court of Craven County, North Carolina,

entered upon the trial of the foregoing action, and the Supreme Court in the opinion reported in *261 NC 362* stated in part as follows:

'McCarter's cross-action against Frazier raises the simple question whether Frazier had fully accounted for the $900.00 collected by him and, if not, the amount of his default. The Court placed the burden upon McCarter to satisfy the jury by the greater weight of the evidence that Frazier is indebted to her and the amount of the indebtedness. Of this, Frazier is in no position to complain. The purport of his pleadings is that he collected $900.00 for McCarter and paid it to her in full. Payment is an affirmative plea and the burden of showing payment is on the one who relies on payment as a defense.'

"The Court found no error in the trial in Superior Court.

"VI. That during the pendency of the foregoing Civil Action No. 7954 and after cross-action was asserted by Hattie McCarter against the respondent, the respondent had a conversation with Hattie McCarter in his office concerning the subject matter of the pending civil action and which conversation was recorded without the knowledge of Hattie McCarter. This conversation is attached to the complaint filed and marked 'Exhibit C'.

"VII. That upon the evidence offered by the complainant, which is supported by the jury verdict in the foregoing Civil Action No. 7954, the Council finds that Reginald Lee Frazier was acting as attorney and

agent of the said Hattie McCarter in connection with the sale of the lots to the plaintiffs in that action and in the collection of the money therefor.

"VIII. That the respondent violated the Canons of Ethics which have been promulgated and adopted by the Council of The North Carolina State Bar in conferring with Hattie McCarter during the pendency of the aforesaid Civil Action No. 7954.

"The Council concludes:

"1. That upon the foregoing Findings of Fact and the evidence offered in this proceeding the respondent is guilty of unprofessional conduct in conferring with Hattie McCarter during the pendency of the aforesaid Civil Action No. 7954, and is in violation of Canon No. 9 as promulgated and adopted by the Council of The North Carolina State Bar, and for such conduct should be reprimanded.

"The Council further resolves that the respondent pay the costs of this action, the same to be taxed by the Council of The State Bar.

"The Council further resolves that the President be directed to enter a proper order for the execution of these resolutions."

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the said Reginald Lee Frazier be given a reprimand by the Council of The North Carolina State Bar at such time and place so designated by the Council; and

That the respondent, Reginald Lee Frazier, is taxed with the costs connected with these proceedings in the amount of One Thousand Seven Hundred Eighty and 53/100

($1,780.53) which does not include attorney's fee for the counsel representing the North Carolina State Bar; and

That the said One Thousand Seven Hundred Eighty and 53/100 ($1,780.53) be paid to The North Carolina State Bar, Justice Building, Raleigh, North Carolina, by the respondent. The statement of said costs is herewith attached to this Judgment and Order.

IT IS FURTHER ORDERED that a certified copy of this Judgment be forwarded to the Clerk of the Supreme Court of North Carolina and to the Clerk of Superior Court of Craven County, North Carolina.

BY ORDER OF THE COUNCIL, this the 15th day of April, 1966.

/s/ J. KENYON WILSON, JR., *President*
The North Carolina State Bar

BEFORE THE COUNCIL OF THE NORTH CAROLINA STATE BAR

NORTH CAROLINA
CRAVEN COUNTY

THE NORTH CAROLINA STATE BAR,

Complainant,

—v.—

REGINALD LEE FRAZIER, Attorney at Law, New Bern, Craven County, North Carolina,

Respondent.

ITEMIZED STATEMENT OF COST OF PROCEEDINGS

1.	Sheriff of Craven County—Service of Summons, Notice and Complaint on Respondent 12/17/64	$ 1.00
2.	U. S. Post Office—Registered Return Receipt Delivery to Respondent of Certification to Supreme Court of Respondent's Request for Trial Committee to be appointed by Supreme Court, 1/29/65	.75
3.	Sheriff of Craven County—Service of Complainant's Motion and Reply on Respondent, 2/2/65	1.00
4.	U. S. Post Office—Registered Return Receipt Delivery to Trial Committee of Order of Supreme Court of their appointment, 2/22/65	2.25

5. Travel Expense of Trial Committee for Pre-Trial conference in New Bern, N. C., 5/28/65 ..... 40.80

6. Sheriff of Craven County—Service of Summonses on James H. White and wife, Wealthy White, and Kennedy W. Ward, 6/24/65 3.00

7. James H. White and Wife, Wealthy White —Witness fees for hearing on 6/28/65 ($5.00 each) 10.00

8. Travel Expense of Trial Committee—For hearing in New Bern, N. C. 6/28/65 ..... 68.69

9. Clifton R. Hood, Court Reporter—Original and 6 copies of Pre-Trial Conference, Adverse Examination of Secretary of N. C. State Bar, Hearing of the Proceeding (Pd. 8/24/65) 491.72

10. N. C. State Bar for duplicating 7 copies of original exhibits introduced at hearing for the trial committee and Respondent, 113 pages x 7 x 10¢ per copy 79.10

11. U. S. Post Office—Registered, Return Receipt Trial Committee Report on Respondent's Attorney 1/10/66 ..... 1.10

12. Sheriff of Craven County—Service of Notice of Hearing before the Council of Respondent's Appeal from Trial Committee's Report on Respondent 3/25/66 ..... 1.00

13. N. C. State Bar for Duplicating 38 copies and binding supplies of Record and Exhibits,

	Trial Committee's Report, Respondent's Exceptions; Re: Respondent's appeal from Trial Committee's Report to full Council Meeting, 4/15/66, 203 pages x 38 copies x 10¢	$791.40	
	Binding Supplies for 38 copies Record & 38 copies Exhibits	41.71	833.11
14.	Roy Palmer—Duplicating Service, Raleigh, N. C., 40 copies Transcript of Pre-Trial Conference, Adverse Examination and Hearing; Re: Respondent's Appeal from Trial Committee's Report to Full Council Meeting, 4/15/66		195.55
	Binding Supplies of 40 copies of Transcript		22.00
15.	U. S. Post Office—Parcel Post, Insured Delivery to each member of the Council and 2 copies to Respondent's attorneys of the entire Record; Re: Respondent's Appeal from Trial Committee's Report to the Full Council		29.46
	TOTAL		$1,780.53

I, EDWARD L. CANNON, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the above represents a true and correct statement of the costs of the above-entitled proceedings.

This 15 day of April, 1966.

/s/ EDWARD L. CANNON, SECY.-TREAS
Edward L. Cannon, *Secretary-Treasurer*
The North Carolina State Bar

APPENDIX "D"

Report of the Trial Committee

(The following is the Report of the Trial Committee as printed in the Record before the Supreme Court of North Carolina, at Pages 79 through 87.)

RECEIVED Jan. 6, 1967, N. C. STATE BAR
Raleigh, N. C.

Raleigh, North Carolina
January 6, 1966

Mr. Edward L. Cannon, Secretary-Treasurer
The North Carolina State Bar
Justice Building
Raleigh, North Carolina

In Re the North Carolina State Bar,
Complainant, vs. Reginald Lee
Frazier, Attorney at Law, New Bern
Craven County, Respondent

Dear Mr. Cannon:

The Trial Committee appointed by the Supreme Court of North Carolina pursuant to G. S. 84-28 § (3), § (f) respectfully transmits herewith the original of report of the Trial Committee dated January 6, 1966 together with the records. We call your attention to G. S. 84-32 with respect to certifying copies of this to the Supreme Court and to the Superior Court of Craven County. We enclosed

sufficient copies to be furnished with copy of this letter to counsel for Complainant and Respondent and his counsel.

Yours very truly,

TRIAL COMMITTEE
F. J. Carnage
F. E. Wallace, Jr.
J. A. Pritchett

Enclosures

cc: Robert D. Rouse, Farmville
Samuel S. Mitchell, Raleigh
Floyd B. McKissick, Durham
Herman L. Taylor, Greensboro
J. LeVonne Chambers, Charlotte
Lisbon C. Berry, Jr., Wilmington

NORTH CAROLINA
CRAVEN COUNTY

BEFORE THE TRIAL COMMITTEE

(Title) REPORT OF THE TRIAL COMMITTEE

The Trial Committee appointed by the Supreme Court of North Carolina, pursuant to G. S. 84-28, subsection (f), to hear and determine this cause, respectfully reports as follows:

This proceeding was instituted December 14, 1964, by summons, notice and complaint to the respondent, praying that disciplinary action be administered to Reginald Lee Frazier based upon charges arising out of Civil Action 7954, entitled "James Henry White and wife, Wealthy White, Plaintiffs, v. Hattie McCarter, Reginald L. Frazier, individually, and Reginald L. Frazier, trustee, Defendants." The pertinent portions of the pleadings, evidence and judgment in the above Civil Action No. 7954 were offered in evidence and filed with the original record in this proceeding.

The respondent filed answer to the complaint instituted by the complainant, which answer discloses that respondent passed the North Carolina Bar examination on August 5, 1960, and was not engaged in the practice of law all of the time intervening between August 5, 1960, and June, 1961, when the note and deed of trust, the subject matter of Civil Action No. 7954, was prepared.

After due notice to counsel representing complainant and respondent, the Trial Committee met at the courthouse in New Bern, North Carolina, May 28, 1965, for a pre-trial

conference and to hear motions. The Trial Committee organized and appointed J. A. Pritchett to serve as chairman of the committee.

At the pre-trial conference, Mr. Robert D. Rouse, Jr. was present as counsel for complainant. The respondent was present in person and represented by Mr. Floyd McKissick, Mr. LeVonne Chambers, Mr. Libson C. Berry and Mr. Samuel S. Mitchell.

The pleadings of the respondent also contain motions to strike as set out therein and the complainant moved to strike paragraph #2 of the fourth further answer. Counsel for complainant and respondent argued the motions and, after hearing argument, the motion of the complainant to strike paragraph #2 of the fourth further answer and defense was allowed.

The following rulings were made upon the motions of the respondent to strike:

Motion to strike section 3 was denied. Motion to strike section 13 was allowed. Motion to strike section 14 was denied. Motion to strike section 15 was allowed. Motion to strike sections 16, 17, 22, 23, 24, 28, 29, 30, 31, 32, 33, 34 and 36 were denied.

To the adverse ruling of the Trial Committee upon each of the motions exceptions were duly made in apt time.

EXCEPTION #13A

After ruling on the motions, respondent moved for an adverse examination of Mr. Edward L. Cannon, Secretary of the North Carolina State Bar. Before the adjournment of the committee it was agreed that the adverse examination would be held in Raleigh, North Carolina, on June 10, 1965,

and that the trial of this cause would be held in New Bern, North Carolina, at 9:30 A.M. June 28, 1965. A report of the proceedings held May 28, 1965, were recorded and transcribed by Clifton R. Hood, Court Reporter, and the original is filed with this report.

The adverse examination of Mr. Edward L. Cannon was held in the Justice Building, Raleigh, North Carolina, June 10, 1965, and the same was reported and transcribed by Mr. Clifton R. Hood, Court Reporter, and the Original is filed with this report.

The Trial Committee was not present for this examination, but the committee has read the evidence and files the original herewith as a part of the record in this proceeding.

On June 28, 1965, pursuant to adjournment, the Trial Committee resumed the hearing at the courthouse in New Bern, North Carolina, at which hearing the respondent was present and represented by Mr. Samuel S. Mitchell, Mr. Floyd B. McKissick, Mr. Lisbon Berry and Mr. Herman Taylor.

At the beginning of the hearing it was stipulated that where the name "McCotter" appears in the record recorded by Clifton R. Hood, it should have been "McCarter."

The proceedings at this hearing were recorded by Clifton R. Hood, Court Reporter, transcribed, and the original filed herewith as a part of the record.

Before the offering of evidence, respondent filed a motion to quash or dismiss for lack of due process by reason of refusal to disclose evidence. This motion is set out on pages 2 to 5 of the transcript of evidence. The motion was denied and respondent excepted.

EXCEPTION #32A.

The respondent then filed another motion to examine the members of the Grievance Committee of the North Carolina State Bar. (R pp 21-24) This motion was denied and respondent excepted.

EXCEPTION #33A.

The respondent then filed motion to quash or dismiss for lack of due process by reason of procedural irregularities. (R pp 24-27) The Trial Committee denied this motion and respondent excepted.

EXCEPTION #34A.

The respondent then renewed the motion to strike which the committee ruled on adversely to the respondent at the pre-trial conference. This motion was denied and respondent excepted.

EXCEPTION #13B.

The complainant then introduced evidence and from the evidence offered and the pleadings, the Trial Committee finds the following facts:

1. That the North Carolina State Bar on December 14, 1964, filed a complaint against Reginald Lee Frazier, Attorney at Law, New Bern, Craven County, North Carolina, alleging that the respondent while acting as trustee in a deed of trust and as attorney at law did unlawfully and willfully—(a) detain without a bona fide claim thereto money collected in his capacity as attorney;

(b) engage in conduct involving willful deceit and fraud and other unprofessional conduct;

(c) detain without bona fide claim thereto property and money collected in a fiduciary capacity;

(d) did violate the Canons of Ethics which have been adopted and promulgated by the Council of the North Carolina State Bar.

II. That the respondent passed his Bar examination August 5, 1960, and was duly admitted to the North Carolina Bar and in the month of June, 1961, was engaged in the practice of law in Craven County, North Carolina.

III. That in June, 1961, respondent prepared a deed of trust from James Henry White and wife, Wealthy White, to secure the payment of a $1,000 note payable to Hattie McCarter, party of the third part in said deed of trust, and the note prepared and secured thereby was made payable to "Hattie McCarter and Reginald L. Frazier"; that the act of respondent in making himself one of the payees in the note appears to have been due to inexperience of respondent at the time in preparation of deeds of trust and notes.

IV. That the respondent collected payments on said note from time to time.

V. That subsequently James Henry White and wife, Wealthy White, instituted action in the Superior Court of Craven County, North Carolina, the same being Civil Action No. 7954, against Hattie McCarter and Reginald Lee Frazier, individually, and Reginald Lee Frazier, trustee, alleging in substance that they owed to Hattie McCarter balance of $350.00 on said note, without interest; that she refused to accept it in settlement of the deed of trust and

seeking cancellation of the deed of trust upon the payment of $350.00 in cash. Hattie McCarter filed answer in said action and alleged as a basis of a cross action against the respondent that she recover of the respondent, Reginald Lee Frazier, such moneys as may be shown to the Court as having been paid to him by the plaintiffs in that action for the defendant, Hattie McCarter. The respondent, Reginald Lee Frazier, filed answer to the cross action of Hattie McCarter, denying the counterclaim and cross action of Hattie McCarter. Upon the trial of the foregoing action, the following issues were submitted to the jury and answered by the jury as follows:

QUESTION: Was the defendant, Reginald L. Frazier, acting as attorney and agent of the defendant Hattie McCarter in connection with the sale of the lots in question to the plaintiffs, and the collection of the money therefor?

ANSWER: Yes.

QUESTION: In what amount if, any, are the plaintiffs White indebted to the defendant Hattie McCarter?

ANSWER: $350.00. Without interest.

QUESTION: In what amount, if any, is the defendant Hattie McCarter entitled to recover of the defendant Reginald L. Frazier on her cross action and counterclaim, as alleged?

ANSWER: $428.00.

The respondent appealed from the judgment of the Superior Court of Craven County, North Carolina, entered upon the trial of the foregoing action, and the Court in the opinion reported in 261 NC 362 stated, in part, as follows:

"McCarter's cross action against Frazier raises the simple question whether Frazier had fully accounted for the $900.00 collected by him and, if not, the amount of his default. The court placed the burden upon McCarter to satisfy the jury by the greater weight of the evidence that Frazier is indebted to her and the amount of the indebtedness. Of this, Frazier is in no position to complain. The purpose of his pleadings is that he collected $900.00 for McCarter and paid it to her in full. Payment is an affirmative plea and the burden of showing payment is on the one who relies on payment as a defense."

The court found no error in the trial in Superior Court.

VI. That, during the pendency of the foregoing Civil Action No. 7954 and after cross action was asserted by Hattie McCarter against the respondent, the respondent had a conversation with Hattie McCarter in his office concerning the subject matter of the pending Civil Action and which conversation was recorded without the knowledge of Hattie McCarter. This conversation is attached to the complaint filed and marked "EXHIBIT C."

VII. That, upon the evidence offered by the complainant, which is supported by the jury verdict in the foregoing Civil Action No. 7954, the committee finds that Reginald Lee Frazier was acting as attorney and agent of the said Hattie McCarter in connection with the sale of the lots to the plaintiffs in that action and in the collection of the money therefor and that he detained without a bona fide claim thereto money in the sum of $428.00 belonging to Hattie McCarter and collected in his capacity as attorney.

VIII. That the respondent violated the Canons of Ethics which have been adopted and promulgated by the Council of the North Carolina State Bar in the collection and retaining of the sum of $428.00 for Hattie McCarter in his capacity as attorney.

Conclusions of Law

I. That, upon the foregoing findings of fact and the evidence offered in this proceeding, the Trial Committee concludes as a matter of law that the respondent is guilty of corrupt or unprofessional conduct in the following particulars:

(a) that the respondent did detain without a bona fide claim thereto money collected in his capacity as attorney for Hattie McCarter in the sum of $428.00.

II. That the conduct of respondent in conferring with Hattie McCarter during the pendency of the aforesaid Civil Action No. 7954 bespeaks of the lack of experience of a young lawyer and is not sufficient in the opinion of the Trial Committee to support more than a reprimand.

Judgment

Thereupon, pursuant to G. S. 84-28 (2), it is hereby ordered and adjudged that the respondent, Reginald Lee Frazier, be, and he is hereby suspended from the practice of law for a period of twelve (12) months next following the date of the filing of this report and judgment. It is further ordered and adjudged that the respondent pay the cost

of this action, the same to be taxed by the Council of the State Bar.

The ruling of the Trial Committee upon exceptions of the respondent to the evidence offered by the complainant as shown in the transcript (R p 27, hearing of June 28, 1965) are indicated as follows: "O" for overruled, "S" for sustained.

This Jan. 6th, 1966.

F. J. CARNAGE
F. E. WALLACE, JR.
J. A. PRITCHETT
Trial Committee

RECEIPT FOR DELIVERY OF ABOVE document showing date delivered 1-10-65; signature or name of Addressee: Samuel S. Mitchell; signature of Addressee's agent, if any: Joyce B. Flippin, appears in original transcript.

APPENDIX "E"

North Carolina General Statutes 84-28

The council or any committee of its members appointed for that purpose, or designated by the Supreme Court,

(1) Shall have jurisdiction to hear and determine all complaints, allegations, or charges of malpractice, corrupt or unprofessional conduct, or the violation of professional ethics, made against any member of the North Carolina State Bar;

(2) May administer the punishments of private reprimand, suspension from the practice of law for a period not exceeding twelve months, and disbarment as the case shall in their judgment warrant, for any of the following causes:

a. Commission of a criminal offense showing professional unfitness;

b. Detention without a bona fide claim thereto of property received or money collected in any fiduciary capacity;

c. Soliciting professional business;

d. Conduct involving willful deceit or fraud or any other unprofessional conduct;

e. Detention without a bona fide claim thereto of property received or money collected in the capacity of attorney;

f. The violation of any of the canons of ethics which have been adopted and promulgated by the council of North Carolina State Bar.

(3) May invoke the processes of the courts in any case in which they deem it desirable to do so and formulate rules of procedure governing the trial of any such person. Such rules shall make provision for:

a. Setting forth the charges in the form required for a complaint in a civil action in the Superior Court.

b. Notice of the charges by the service upon the person charged of a copy of the said complaint. Such service made by any officer authorized to serve legal processes wherever the person charged may be found.

c. The right of the defendant to file a written and verified answer in which he may plead any defense to the merits of the charge, the sufficiency of the charge as alleged, or any other defense available to him. All defenses must be asserted by verified answer.

d. The right of the person charged to demand a trial:

1. In the superior court at a regular term for the trial of civil cases by a judge and a jury, or by written agreement of all parties trial by jury may be waived and the facts found by the judge, or

2. By a committee of not less than three members of the Bar who are not members of the council and are actively practicing in the State, such committee to be designated by the Supreme Court, or

3. By a committee of not less than three members of the council. The election permitted shall be made in the answer, and if no election is made in the answer the person charged shall be conclusively deemed to have elected to be tried by a committee of the council. If the person charged shall not elect to be tried in the superior court in term as above provided, he shall be conclusively deemed to have waived all right to a trial by jury.

e. The certification, if the person charged shall elect to be tried in the superior court, of the original complaint and answer shall be made to the clerk of the superior court of the county in which such person shall reside if he resides in this State, or not reside in this State. The proceeding shall not be subject to dismissal if certification is made for removal to the proper county. After certification all proceedings in connection with the charge shall be conducted in the superior court in term in accordance with the laws and rules relating to civil actions, with right of appeal to the Supreme Court.

f. For the trial of the person charged before a committee (if trial by a jury is waived) selected in accordance with the foregoing provisions, which trial shall conform as nearly as practicable to the procedure provided by law before referees in references by consent with the right to appeal to the superior court by the filing of exceptions with the council and from order or judgment of

the council, the entire record shall be filed with the clerk of the superior court of the county in which the person charged resides if he resides within the State, or in Wake County if the person charged does not reside within the State, and thereafter all proceedings in connection with the charge shall be conducted in the superior court in term in accordance with the laws and rules relating to civil actions in which there has been a reference by consent, but neither party shall be entitled to a trial by jury. Both parties shall have the right to appeal to the Supreme Court in accordance with the procedure permitting appeals in civil actions.

Trial before the committee appointed for that purpose by the council, or designated by the Supreme Court, shall be held in the county in which the accused member resides or if the accused is residing outside of the State, then in Wake County: Provided, however, that the committee conducting the hearing shall have power to remove the same to any county in which the offense, or any part thereof, was committed, if in the opinion of such committee the ends of justice or convenience of witnesses require such removal. The procedure herein provided shall apply in all cases of discipline or disbarments arising under this section.

Whenever the council shall have directed a hearing upon any charges against a member of the bar and said member shall request it to do so, the council shall advise the Supreme Court of the same and request the Supreme Court, through the Chief Justice, to designate a committee of not less than three members of the bar who are not members

of the council, and who are actively practicing in the State, to sit as a trial committee to hear the cause; said committee when so designated shall proceed in the same manner as in the case of a committee of the council and under the same procedures set forth herein or as prescribed by rules adopted by the council and approved by the Supreme Court.

APPENDIX "F"

Rules of the North Carolina State Bar, Article VI

(The following are the applicable Rules which pertain to the disciplinary actions involving attorneys at law.)

Article VI.

Meetings of the Council.

[Relative portions of Rules of North Carolina State Bar, Article VI thereof.]

Section 5. *Standing Committees of the Council:*—The standing committees of the council shall consist of:

a. An Executive Committee of not less than three councilors, elected by the Council, and the President and Secretary-Treasurer.

It shall be the duty of the Executive Committee to perform such duties as the Council shall designate including, however, the auditing of the books and records of the Secretary-Treasurer at each regular meeting of the Council.

b. Committee on Legal Ethics and Professional Conduct of not less than three councilors elected by the Council.

It shall be the duty of the Committee on Legal Ethics and Professional Conduct to study canons of ethics and professional conduct and make such recommendations from time to time to the Council as it may deem proper and necessary; study and determine such questions as may arise as to the meaning and application of the canons of ethics and rules of professional conduct, and advise members of the State Bar upon request in respect thereto, and perform such other duties in connection with the canons

of ethics and rules of professional conduct as it may be requested to perform by the Council of the North Carolina State Bar.

c. Committee on Grievances of not less than three councilors elected by the Council.

1. It shall be the duty of Committee on Grievances to investigate and study all complaints which may be made against members of the State Bar. The Committee may include in its investigation all matters which may come to its attention with reference to the member complained of. It shall make a report to the Council at each quarterly meeting of the action taken by it upon all matters which have come to its attention and, if the action recommended be other than dismissal of the complaint, it shall state the facts and circumstances which have come to its attention in connection with the complaint. If the recommendation of the Committee on Grievances is for dismissal of the charges, the report shall be private. It shall not be necessary to examine witnesses, but the Committee shall have authority to require affidavits or other statements in sufficient form and substance to satisfy it as to the probable truth of the charges contained in the complaint.

2. The Secretary shall require all complaints to be in the form of affidavits upon forms prepared for such purpose. Where the complaint on its face requires it, the Secretary shall obtain certified copies of court records, or verified copies of any other exhibit or exhibits, which shall accompany and be attached to the complaint.

3. All verified complaints lodged with the Secretary shall be immediately forwarded to the Chairman of Grievance Committee for initial screening.

4. If the Chairman of the Grievance Committee is of the opinion that the complaint should be entertained, he shall forthwith proceed to issue letter of notice to the accused attorney, setting forth the substance of the charges made against him in sufficient detail to enable such accused attorney to file an intelligent answer thereto, and notifying the accused attorney to file his preliminary answer to the charges within 15 days of the receipt of such letter of notice, and further advising such accused attorney that he may attach to his answer such exhibits as he may desire, which letter of notice shall be forwarded to such accused attorney by certified or registered mail. The answer need not be verified, but all exhibits attached thereto must be certified.

5. Any action taken by the Chairman of the Grievance Committee shall be reviewed by the full committee.

6. After answer has been filed by the accused attorney, or the time for filing such answer has expired, the Grievance Committee shall consider the charge filed and make recommendation to the full Council.

7. Where any complaint has been entertained by the Grievance Committee, the Secretary shall keep a docket on such case, listing thereon the action taken, the date thereof, and the progress of the case from the time of its original institution until its final conclusion.

d. Committee on Legislation and Law Reform of not less than three councilors elected by the Council.

It shall be the duty of the Committee on Legislation and Law Reform to examine proposed changes in the law; to examine and propose changes in the law and judicial pro-

cedure; to promote the simplification of law and procedure; and perform such other duties in connection with the improvement of law and procedure as may from time to time be requested by the Council of the North Carolina State Bar.

The Committee on Legislation and Law Reform shall not appear before committees of the Legislature, except upon the approval of the Council, nor shall it make specific endorsements of changes in the laws or of new laws except with the consent of the Council.

e. Committee on Unauthorized Practice of not less than three Councilors elected by the Council.

f. Committee on Membership of not less than three Councilors elected by the Council.

APPENDIX "G"

Assignments of Errors

NORTH CAROLINA
CRAVEN COUNTY

THE NORTH CAROLINA STATE BAR, Complainant,

vs.

REGINALD LEE FRAZIER, Attorney at Law, New Bern, Craven County, North Carolina, Respondent.

Respondent groups his EXCEPTIONS and ASSIGNMENTS OF ERRORS:

EXCEPTION #21 and EXCEPTIONS #1, 2, 3, 4, 5, 6, 7, 8, 9, 16, and 17 (R pp 127-130, 143-144)

EXCEPTIONS #1, 2, 3, 4, 5, 6, 7, 8, 9, 16 and 17 (R pp 127-130, 143-144) are recapitulated in and brought forward in EXCEPTION #21 (R p 191) EXCEPTIONS #1 to 9 were directed toward the Trial Committee's Report. EXCEPTIONS #16 and 17 were directed toward the Judgment of the Full Council, while EXCEPTION #21 was directed toward the Judgment of the Superior Court.

Respondent's EXCEPTION #21 (R p 162) was as follows:

"EXCEPTION #21

Respondent objects and excepts to the affirmance by the Court of the following findings of fact as made by the Council of the North Carolina State Bar:

1. That the North Carolina State Bar on December 14, 1964, filed a complaint against Reginald Lee Frazier, Attorney at Law, New Bern, Craven County, North Carolina, alleging that the Respondent while acting as Trustee in a deed of trust and as attorney at law did unlawfully and wilfully—

(a) detain without a bona fide claim thereto money collected in his capacity as attorney;

(b) engage in conduct involving wilful deceit and fraud and other unprofessional conduct;

(c) detain without bona fide claim thereto property and money collected in a fiduciary capacity;

(d) did violate the Canons of Ethics which have been adopted and promulgated by the Council of the North Carolina State Bar.

'II. That the Respondent passed his Bar examination August 5, 1960 and was duly admitted to the North Carolina State Bar and in the month of June 1961 was engaged in the practice of law in Craven County, North Carolina.

'III. That in June 1961 Respondent prepared a deed of trust from James Henry White and wife, Wealthy White, to secure the payment of a $1000.00 note payable to Hattie McCarter, party of the third part in said deed of trust, and the note prepared and secured thereby was made payable to

'Hattie McCarter and Reginald L. Frazier'; that the act of Respondent in making himself one of the payees in the note appears to have been due to inexperience of Respondent at the time of preparation of deeds of trust and notes.

IV. That the Respondent collected payments on said note from time to time.

V. That subsequently James Henry White and wife, Wealthy White, instituted action in the Superior Court of Craven County, North Carolina, the same being Civil Action No. 7954, against Hattie McCarter and Reginald Lee Frazier individually, and Reginald Lee Frazier, Trustee, alleging in substance that they owed to Hattie McCarter balance of $350.00 on said note, without interest; that she refused to accept it in settlement of the deed of trust and seeking cancellation of the deed of trust upon the payment of $350.00 in cash. Hattie McCarter filed answer in said action and alleged as a basis of a crossaction against the Respondent that she recover of the Respondent, Reginald Lee Frazier, such monies as may be shown to the Court as having been paid to him by the plaintiffs in that action for the defendant, Hattie McCarter. The Respondent, Reginald Lee Frazier, filed answer to cross action of Hattie McCarter, denying the counterclaim and cross action of Hattie McCarter. Upon the trial of the foregoing action the following issues were submitted to the jury and answered by the jury as follows:

QUESTION: Was the defendant, Reginald L. Frazier, acting as attorney and agent of the Defendant, Hattie McCarter, in connection with the sale of the lots in question to the plaintiffs, and the collection of the money therefor?

ANSWER: Yes.

QUESTION: In what amount, if any, are the plaintiffs, White, indebted to the defendant, Hattie McCarter?

ANSWER: $350.00. Without interest.

QUESTION: In what amount, if any, is the defendant, Hattie McCarter, entitled to recover of the defendant Reginald L. Frazier, on her cross action and counterclaim, as alleged?

ANSWER: $428.00.

'The Respondent appealed from the judgment of the Superior Court of Craven County; North Carolina, entered upon the trial of the foregoing action, and the Court in the opinion reported in 261 NC 362 stated in part as follows:

'"McCarter's cross action against Frazier raises the simple question whether Frazier had fully accounted for the $900.00 collected by him and, if not, the amount of his default. The Court placed the burden upon McCarter to satisfy the jury by the greater weight of the evidence that Frazier is indebted to her and the amount of the indebtedness. Of this, Frazier is in no position to complain. The purport of his pleadings is that he collected $900.00 for McCarter and paid it to her in full. Payment is an affirmative plea and the burden of showing payment as a defense.

'VI. That during the pendence of the foregoing Civil Action No. 7954 and after cross action was asserted by Hattie McCarter against the Respondent, the Respondent had a conversation with Hattie McCarter in his office concerning the subject matter of the pending civil action and which conversation was recorded without the knowledge of Hattie McCarter. This conversation is attached to the complaint filed and marked Exhibit "C".

'VII. That Reginald Lee Frazier was acting as attorney and agent of the said Hattie McCarter in connection with the sale of the lots to the plaintiffs in that action and in the collection of the money therefor.'

"The basis of this EXCEPTION is that all and each of the above quoted findings of fact are entirely based upon incompetent and prejudicial hearsay evidence which was offered and received, over the respondent's objections and exceptions, in a manner which was purposefully designed and calculated to shift complainant's burden of proof and complainant's burden of prosecuting its action to the shoulder of respondent. This deliberate acceptance of incompetent hearsay as evidence was patently in denial of respondent's rights under Section 11 of Article I of the Constitution of North Carolina, pertaining to self-incrimination and the right of confrontation, and under Section 17 of said Article of the State Constitution in regards to procedural due process of law. Respondent also invokes herein constitutional protection of Due Process and Equal Protection Clauses of the 14th Amendment to the federal constitution against a trial based solely under hearsay evidence.

"Respondent also objects and excepts to the above quoted findings of fact as follows:

"FINDING OF FACT #1.

"Respondent objects and excepts to Finding of Fact #1 for the reason that the so called Complaint filed against Respondent, Reginald Lee Frazier, is unauthorized as having been filed upon exhibits and without being supported by a verified complaint as contemplated by statute and the rules of the State Bar and particularly such rules as are found in Appendix 6 of the General Statutes of North

Carolina. This irregularity was further pointed up by Respondent's Motion to Quash or Dismiss for Lack of Due Process by Reason of Procedural Irregularities. Reception of evidence from which the Court found all of the facts included in this Finding of Facts was objected to before the Trial Committee and the Full Council.

"FINDING OF FACT #II (R p 166)

"Respondent objects and excepts to Finding of Fact #II as being totally irrelevant and immaterial in this proceeding. Reception of evidence from which the Court found all of the facts included in this Finding of Fact was objected to before the Trial Committee and the Full Council.

"FINDING OF FACT #III (R p 166)

"Respondent objects and excepts to Finding of Fact #III as being totally unsupported by competent evidence and as having been based upon the Record and Transcript in the Trial of a Civil action, to wit, *White et ux* vs. *Hattie McCarter et al,* which record and transcript were introduced in Respondent's hearing in this cause over his strenuous objections and exceptions. Respondent further objects and excepts to the Finding of Fact #III as being insufficient to support or to aid in supporting the Conclusion of Law arrived at by the Trial Committee, the Full Council, or the court. Reception of evidence from which the Court found all of the facts included in this Finding of Fact was objected to before the Trial Committee and the Full Council.

"FINDING OF FACT #IV: (R p 176)

"Respondent objects and excepts to Finding of Fact #IV as being totally unsupported by competent evidence and as

having been based upon the Record and Transcript in the Trial of a Civil Action, to wit, *White et ux* vs. *Hattie McCarter et al,* which Record and transcript were introduced in Respondent's hearing in this cause over his strenuous objections and exceptions. Respondent further objects and excepts to the Finding of Fact #IV as being insufficient to support or to aid in supporting the Conclusion of Law arrived at the Full Council or the Court. Reception of evidence from which the Court found all of the facts included in this Finding of Fact was objected to before the Trial Committee and the Full Council.

"FINDING OF FACT #V (R p 167)

"Respondent objects and excepts to this Finding of Fact #V as being totally unsupported by competent evidence and as having been based upon the Record and Transcript in the Trial of a Civil Action, to wit, *White et ux* vs. *Hattie McCarter et al,* which Record and Transcript were introduced in Respondent's hearing in this cause over his strenuous objections and exceptions. Respondent further objects and excepts to the Finding of Fact #V as being insufficient to support or to aid in supporting the Conclusion of Law arrived at by the Trial Committee, Full Council, or this Court. Finally, Respondent objects and excepts to Finding of Fact #V insofar as Finding of Fact #V includes matter which was before the Supreme Court of North Carolina in an appeal in *White et ux* vs. *Hattie McCarter et al,* which is reported at Page 362, North Carolina Reports, Volume 261. This exception is directed toward the circumstance that none of the facts found are based upon competent evidence and reception of the evidence was objected to by Respondent at every stage of this proceeding.

"FINDING OF FACT #VI. (R p 168)

"Respondent objects and excepts to Finding of Fact #VI as being totally unsupported by competent evidence and as having been based upon the Record and Transcript in the trial of a Civil action, to wit, *White et ux* vs. *Hattie McCarter et al,* which record and transcript were introduced in Respondent's hearing in this cause over his strenuous objections and exceptions. Respondent further objects and excepts to the Finding of Fact #VI as being insufficient to support or to aid in supporting the Conclusion of Law arrived at by the Trial Committee, the Full Council or this Court. Reception of evidence from which the Court found all of the facts included in this Finding of Fact was objected to before the Trial Committee, the Full Council, and at each stage of this proceeding.

"FINDING OF FACT #VII (R p 168)

"Respondent objects and excepts to Finding of Fact #VII as being totally unsupported by competent evidence and as having been based upon the Record and Transcript in the Trial of a Civil Action, to wit, *White et ux* vs. *Hattie McCarter et al,* which Record and Transcript were introduced in Respondent's hearing in this cause over his strenuous objections and exceptions. Respondent further objects and excepts to the Finding of Fact #VII as being insufficient to support or to aid in supporting the Conclusions of Law arrived at the Trial Committee and the Full Council or this Court. Reception of evidence from which the Court found all of the facts included in this Finding of Fact was objected to before the Trial Committee, the Full Council and at each stage of this proceeding."

All of this ASSIGNMENT OF ERROR relates to the Court's affirmance of FINDING OF FACTS, as made by the Full Council, and which was based upon inadmissible, incompetent and prejudicial hearsay evidence.

II

EXCEPTION #22 (R p 168)

Respondent's EXCEPTION #22 was directed toward the Judgment of the Superior Court and was as follows:

"EXCEPTION #22.

"Respondent objects and excepts to the making of additional findings of fact by the Court which were at variance with the findings of fact, as found by the Full Council, and which additional findings of fact were as follows:

"'VIII. That the conversation aforesaid was recorded without the permission or knowledge of Hattie McCarter; that at the time of said conversation the said Hattie McCarter was represented by counsel; and said conversation was had without the knowledge or consent of said counsel.

"'IX. That Reginald Lee Frazier retained without a bona fide claim thereto money in the sum of $428.00 belonging to Hattie McCarter and collected in his capacity as attorney.

"'X. That the Respondent violated the laws of the State of North Carolina, and specifically G.S. 84-28 (2) b in the collection and retaining of the sum of $428.00 for Hattie McCarter in his capacity as attorney.

"'XI. That the Respondent violated the Canons of Ethics which have been promulgated and adopted by the Council of the North Carolina State Bar, and specifically Canon No. 9 in conferring with Hattie McCarter during the pendency of the aforesaid Civil Action No. 7954.'"

The basis of this EXCEPTION and ASSIGNMENT OF ERROR is that, in presuming to find facts not found by the Full Council, the Court is presuming improperly to exercise the judicial discretion of the Superior Court as upon a review of a referee's report, as provided by North Carolina General Statute 1-194; whereas, North Carolina General Statute 1-194, as applied to the Judgment of the Full Council and as applied to such manner as to permit the finding of fact by the Superior Court contrary of at variance to the Finding of fact by the Full Council, is unconstitutional if so applied, the presumptive exercise, of such powers being contrary to Article IV of the Constitution of North Carolina and to the doctrine of the separation of judicial and administrative power, as protected by the Due Process and Equal Protection Clauses of the 14th Amendment to the Federal constitution. Moreover, assuming that North Carolina General Statute 1-194 does apply to this case, the presumptive exercise by the Superior Court in the matter of finding facts not found by the Full Council and in entering a different Judgment from that of the Full Council, is contrary to the judicial power limited in North Carolina General Statute 1-194, which requires a 'ten days' notice to the adverse party' of a Motion to 'set aside, modify . . .' a referee's report. Such exercise of jurisdiction of the Superior Court and as being without notice to respondent, contrary to Section 17 of Article I of the Constitution of North Carolina and as being contrary to the Due Process Clause of the 14th Amendment to the Federal constitution."

III.

EXCEPTION #23 (R p 170)

Respondent's EXCEPTION #23 was directed to the Judgment of the Superior Court and was as follows:

"EXCEPTION #23

"Respondent objects and excepts to all of the conclusions of law, as made by the Superior Court, upon the same reasons as are set out in EXCEPTION #22 and by reason of the same constitutional provisions invoked in EXCEPTION #22. Respondent further objects and excepts to the conclusions of law of the Superior Court as being totally unsupported by competent findings of fact or competent evidence or by a proceeding which is authorized by the Rules of the North Carolina State Bar or the General Statutes of North Carolina or the Constitutions of the State of North Carolina of the United States."

IV.

EXCEPTION #24 (R p 170)

Respondent's EXCEPTION #24 was directed toward the Judgment of the Superior Court and was as follows:

"EXCEPTION #24

"Respondent objects and excepts to the signing and entry of Judgment by this Court by reason of the matters set out in EXCEPTION #22 and #23 and by reason of the constitutional protections therein invoked."

V.

EXCEPTIONS #25, 31, 32 and 32A (R p 171)

Respondent's EXCEPTION #25 was directed toward the Judgment of the Superior Court and was as follows:

"EXCEPTION #25

"Respondent objects and excepts to the failure of the Superior Court to allow respondent's Motion to Quash or Dismiss for Lack of Due Process by Reason of Refusal to Disclose Evidence. This was EXCEPTION #20 (10) to the Judgment of the Full Council."

Respondent's EXCEPTION #32 was as follows:

"EXCEPTION #32:

"Mr. Mitchell: And, of course, for the record we would like the record to show that we objected to the limited examination of the minutes and to having to examine those minutes in the presence of the Trial Committee and having to examine them today without our having had at least the ten days that we asked for prior to the further continuation of the hearing of this cause."

Respondent's EXCEPTION #32A was to the Report of the Trial Committee, wherein the Trial Committee formally recorded its action and Respondent's exception thereto in respect to this motion.

VI.

EXCEPTION #26 and EXCEPTIONS #11, 20, 33 and 33A (R pp 171, 131, 146)

Respondent's EXCEPTION #26 was directed toward the Judgment of the Superior Court and was as follows:

"EXCEPTION #26

"Respondent objects and excepts to the failure of the Superior Court to allow respondent's Motion for Adverse Examination of Members of the Grievance Committee.

This was EXCEPTION #20 (11) to the Judgment of the Full Council."

"EXCEPTION #33

"Mr. Pritchett: Let the record show that this motion was filed the 28th day of June and that no request was made for the Trial Committee at the Pre-Trial Conference for such an examination. The Trial Committee denies the Respondent's motion for the pre-trial examination of the Grievance Committee."

Respondent's EXCEPTIONS #11, 20 and 33A are directed toward the same alleged error.

VII.

EXCEPTION #27 and EXCEPTIONS #12, 20, 34 and 34A (R pp 171, 131, 146)

Respondent's EXCEPTION #27 was directed toward the Judgment of the Superior Court and was as follows:

"EXCEPTION #27

"Respondent objects and excepts to the failure of the Superior Court to allow respondent's Motion to Quash or Dismiss for Lack of Due Process by Reason of Procedural Irregularities. This was EXCEPTION #20 (12) to the Judgment of the Full Council."

Respondent's EXCEPTION #12, 20, 34 and 34A are directed toward the same alleged error.

VIII.

EXCEPTIONS #28 and EXCEPTIONS #13, 13A, 13B and 20 (R pp 171, 131, 146)

Respondent's EXCEPTION #28 was directed to the Judgment of the Superior Court and was as follows:

"EXCEPTION #28

"Respondent objects and excepts to the failure of the Superior Court to grant respondent's Motions to Strike, which Motions were overruled by the trial Committee, whose rulings were affirmed by the Full Council. This was EXCEPTION #20 (13) to the Judgment of the Full Council".

Respondent's EXCEPTION #13A was as follows:

"EXCEPTION #13A to Trial Committee's Report.

"The following rulings were made upon the Motion of the Respondent to strike:

"Motion to strike section 3 was denied. Motion to Strike Section 13 was allowed. Motion to Strike Section 14 was denied. Motion to strike Section 15 was allowed. Motion to strike Sections 16, 17, 22, 23, 24, 28, 29, 30, 31, 32, 33, 34, and 36 were denied.

"To the adverse rulings of the Trial Committee upon each of the motions exceptions were duly made in apt time."

Respondent's EXCEPTIONS #13, 13B and 20 are directed toward the same alleged error,

EXCEPTION #29 and EXCEPTIONS #14, 14A and 20 (R pp 171, 132, 146)

Respondent's EXCEPTION #29 was directed toward the Judgment of the Superior Court and was as follows:

"EXCEPTION #29

"Respondent objects and excepts to the failure of the Superior Court to grant respondent's written Motion for

Judgment as of Nonsuit. This was EXCEPTION #20 (14) to the Judgment of the Full Council."

Respondent's EXCEPTIONS #14, 14A and 20 are directed toward the same alleged error.

X.

EXCEPTIONS #34 and 34A (R pp 52, 83)

Respondent's EXCEPTION #34 was directed toward the denial of his written Motion to Quash or Dismiss for Lack of Due Process by Reason of Procedural Irregularities, Respondent contending in said Motion, among other things, that this disbarment proceeding against him had "not proceeded from any reliable complaint as to respondent's conduct, but the same has proceeded purely and solely from spurious and prejudiced innuendo as twisted from the Civil Action upon which the proceeding against respondent is based."

XI.

EXCEPTIONS #35, 36, 37, 38, and 39 (R pp 175-176)

Respondent's EXCEPTIONS 35 through 39 are directed toward the admission into evidence at Respondent's trial of Reports of the Grievance Committee, minutes of the Grievance Committee meeting, minutes of the meeting of the Council of The North Carolina State Bar, and certified copy of letter of notification to Respondent, being the admission of purely hearsay, prejudicial, and incompetent evidential matter, which denied Respondent the right to confront accusers and the means of testing the credibility of this hearsay evidence.

XII.

EXCEPTIONS #40, 41, 42, 43, 44, 45 and 46 (R pp 178-181)

Respondent's EXCEPTIONS #40 through 46 are directed toward the admission as evidence of pleadings in the instant action which have no evidential or probative value and which pleadings, when accepted as evidence, were highly prejudicial, unfair and which admission into evidence constituted an illegal attempt to shift Complainant's burden of proof to Respondent.

The above enumerated EXCEPTIONS are to the admission of paragraphs 10, 14, 16, 17, 22, 23 and 24 of the Complaint in the instant cause, along with the corresponding Answer of Respondent, into evidence, whereas, Respondent's Motion to Strike included all of these paragraphs with the Exception of Paragraph 10. Respondent's EXCEPTIONS to the overruling of his Motion to Strike are brought forward under Group VIII of these ASSIGNMENTS OF ERROR.

XIII.

EXCEPTIONS #47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63 and 64 (R pp 182-187)

Respondent's EXCEPTIONS #47 through 58 and EXCEPTIONS #60 and 64 are directed toward the admission as evidence of pleadings and proceedings in an entirely unrelated Civil Action, wherein parties and issues are entirely different and which have no evidential or probative value and which pleadings, when accepted as evidence, were highly prejudicial, unfair and which admission into evidence constituted an illegal attempt to shift Complainant's burden of proof to Respondent.

The evidence objected to in these EXCEPTIONS included documents from Civil Case Number 7954, Craven County, entitled *James Henry White and wife, Wealthy White,* vs. *Hattie McCarter, Reginald L. Frazier, individually, and Reginald L. Frazier, Trustee.*

XIV.

EXCEPTION #59 (R p 184)

Respondent's EXCEPTION #59 is directed toward the reception as evidence in the instant proceeding of the Judgment and Opinion of the Supreme Court of North Carolina against Respondent in a Civil Action which is totally unrelated to the instant action and to the issues and parties herein involved.

The Judgment excepted to when admitted into evidence was the Judgment in the appeal of Civil Case Number 7954, Craven County, entitled *James Henry White and wife Wealthy White,* vs. *Hattie McCarter, Reginald L. Frazier, individually, and Reginald L. Frazier, Trustee.*

XV.

EXCEPTIONS #64, 65, 66 and 67 (R pp 187-188)

Respondent's EXCEPTIONS #64 through 67 are related to the reception into evidence in the instant proceeding of the Court Reporter's Transcript in an entirely different civil action wherein the parties and issues are entirely different and to the reception in evidence of pleadings of the instant case which related to the civil action above mentioned. This ASSIGNMENT OF ERROR is further directed toward the reception into evidence against Respondent of matter allegedly occurring and transpiring in an en-

tirely separate unrelated civil action wherein the parties and issues were different and which civil action was an action in the Superior Court of Craven County before a Judge and a jury.

The evidence objected to in these EXCEPTIONS including documents from Civil Case Number 7954, Craven County, entitled *James Henry White and wife, Wealthy White* vs. *Hattie McCarter, Reginald L. Frazier, individually, and Reginald L. Frazier, Trustee.*

The evidence objected to under these EXCEPTIONS also includes as incompetent and inadmissible conversation which was admitted into evidence in the Civil Action referred to above and which is a stranger to the parties and issues in this proceeding.

The 16th day of January, 1967.

Respectfully Submitted:

MITCHELL & MURPHY
126½ East Hargett Street
Raleigh, North Carolina

MOSES BURT, JR.
213½ West Main Street
Durham, North Carolina

HERMAN L. TAYLOR
Post Office Box 20027
Greensboro, North Carolina

JOHN H. WHEELER
Mechanics & Farmers Bank
Durham, North Carolina

J. LeVonne Chambers
405½ East Trade Street
Charlotte, North Carolina

Lisbon C. Berry, Jr.
511½ North 4th Street
Wilmington, North Carolina

Earl Whitted, Jr.
209 South James Street
Goldsboro, North Carolina

By: /s/ Romallus O. Murphy
Counsel for Respondent

INDEX

Citation to Opinion Below 1

Jurisdiction 1

Questions Presented 1-2

Constitutional and Statutory Provisions Involved 2-7

Statement of Facts 7-13

Argument 13-36

Conclusion 36

TABLE OF CASES

ANDERSON v. McRAE, 211 N.C. 197, 189 S.E. 639 24

BANK v. WHILDEN, 175 N.C. 52, 94 S.E. 723 ..... 33, 34

BOARD OF DENTAL EXAMINERS v. GRADY, 268 N.C. 541, 151 S.E. 2d 25 (1966) 21

BRYAN v. MALLOY, 90 N.C. 508 33

COBURN v. TIMBER CORP., 257 N.C. 222 at 226, 125 S.E. 2d 593 21

COLE v. ARKANSAS, 333 U.S. 196, 68 S. Ct. 514, 92 L. ed. 644 22

EBBS, In the Matter of, 150 N.C. 45 (1908), 63 S.E. 190 ..... 27, 31

FALZONE, In Re, 220 S.W. 2d 765 (Mo. 1949) 33

FRAZIER v. THE NORTH CAROLINA STATE BAR, 269 N.C. 625, 153 S.E. 2d 367 ..... 31, 34, 35

HARTIS v. ELECTRIC RR, 162 N.C. 236 (1913), 78 S.E. 164 ..... 33, 34

KINGSLAND v. DORSEY, 70 S. Ct. 123, 338 U.S. 318 32

LACY, Re, 234 Mo. App. 71, 112 S.W. 2d 594 30

McKAY, In Re, (Alaska), 416 P. 2d 823 (1964), 382 U.S. 803, 15 L. ed. 256, 86 S. Ct., Cert. Deferred, 384 U.S. 1003, 865 S. Ct. 1907, Cert. Denied, 87 S. Ct. 11, Rehearing Denied 22

McLEAN v. SCHEIBER, 212 N.C. 544, (1937), 193 S.E. 708 33

MABE v. MABE, 122 N.C. 588, 13 S.E. 234 34

PEOPLE OF THE STATE OF COLORADO v. HOWARD, ATTORNEY-RESPONDENT, 364 P. 2d 380, Cert. Denied, March 1962, 369 U.S. 819 ..... 30, 32

POINTER v. STATE OF TEXAS, 380 U.S. 400, 85 S. Ct. 1065, 1069, 1070 32

RANDALL v. BRIGHAM, 7 Wall 523, 19 L. ed. 285 35

SANTOSUOSSO, In Re, 318 Mass. 489, 62 N.E. 2d 105, 161 A.L.R. 898 ..... 28, 30

SELLING v. RADFORD, 243 U.S. 46, 37 S. Ct. 377 15

SPEISER v. RANDALL, 357 U.S. 424 at 525, 78 S. Ct. 1332, at 1341 20

STATE, Ex rel., NEBRASKA STATE BAR ASSOCIATION v. GUDMUNDSEN, 145 Neb. 324, 16 N.W. 2d 474 30

STATE OF OKLAHOMA v. O'BRYAN, 385 P. 2d 876, App. Dismissed, Cert. Denied, 376 U.S. 649, 11 L. ed. 2d 980, 84 S. C. 983 31

STEWART v. REGISTER, 108 N.C. 588, 13 S.E. 234 34

TENNESSEE BAR ASSOCIATION v. FREEMAN, 362 S.W. 2d 828 ..... 30, 31

THEARD v. U. S., 354 U.S. 155, 77 S. Ct. 1274 14

WALL, Ex parte, 107 U.S. 265, 27 L. ed. 552, 273 ..... 15, 23, 35

WERNER v. STATE BAR, 24 Cal. 2d 611, 150 P 2d 892 30

WHITE v. McCARTER, 261 N.C. 362, 134 S.E. 2d 612 ..... 7, 11, 22, 28, 34, 35

STATUTES

N.C.G.S. 1-194 ..... 6, 21

N.C.G.S. 1-195 21

N.C.G.S. 84 ..... 16, 23

N.C.G.S. 84-28 ..... 2, 3, 4, 5, 6, 16, 19, 36

N.C.G.S. 84-28 (1), (2) 16

N.C.G.S. 84-28 (2) b 13

N.C.G.S. 84-28 (3) 17, 18

N. C. G. S. 84-28 (3) d 2 19
N. C. G. S. 84-28 (3) f 6, 19, 20, 21
N. C. G. S. 90-41 21
N. C. G. S. 150 23
N. C. G. S. 150-9 23

CANONS OF ETHICS

CANON 9 OF THE CANONS OF ETHICS OF THE NORTH CAROLINA STATE BAR 12, 13, 35, 36

TREATISES

STANSBURY ON EVIDENCE, 2d Ed. Sec. 145 34

OTHER AUTHORITIES

161 A.L.R. 898 31

STRONG'S NORTH CAROLINA INDEX,
Vol. 3 PLEADINGS Sec. 2, p. 600,
Vol. 2 EVIDENCE Sec. 20, p. 264 28

APPENDICES

APPENDIX "A"—Chapter 84 Relative to The North Carolina State Bar 38-60

APPENDIX "B"—Rules of The North Carolina State Bar Relative to the Procedure for Disciplining Attorneys at Law 61-71

In The

Supreme Court of the United States

October Term, 1967

No. 264

IN THE MATTER OF REGINALD LEE FRAZIER, ATTORNEY AT LAW, NEW BERN, CRAVEN COUNTY, NORTH CAROLINA,

Petitioner,

v.

THE NORTH CAROLINA STATE BAR,

Respondent.

Brief of Respondent The North Carolina State Bar In Opposition to Petition For Writ of Certiorari.

OPINION BELOW

The Opinion of the Supreme Court of North Carolina in this case now before this Court is reported in 269 N.C. 625, 153 S.E. 2d 367.

JURISDICTION

The Judgment of the Supreme Court of North Carolina was entered on March 22, 1967. The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1257 (3).

QUESTIONS PRESENTED

I. DOES THE NORTH CAROLINA STATUTORY PROCEDURE FOR THE DISCIPLINE AND DISBARMENT OF ATTORNEYS DEPRIVE THE PETITIONER DUE PROCESS OF LAW?

II. DID THE MANNER IN WHICH PETITIONER WAS ALLOWED TO INSPECT THE MINUTES OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR VIOLATE ANY OF HIS CONSTITUTIONAL RIGHTS?

III. WAS THE PETITIONER DEPRIVED OF DUE PROCESS BY THE NATURE OF THE EVIDENCE WHICH WAS INTRODUCED AGAINST HIM?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner attempts to bring this case under the provisions of the due process privileges or immunities, or equal protection clauses of the 14th Amendment to the Constitution of the United States. This case involves the application of North Carolina General Statutes 84-28 which reads as follows:

"§ 84-28. Discipline and disbarment.—The Council or any committee of its members appointed for that purpose, or designated by the Supreme Court,

(1) Shall have jurisdiction to hear and determine all complaints, allegations, or charges of malpractice, corrupt or unprofessional conduct, or the violation of professional ethics, made against any member of the North Carolina State Bar;

(2) May administer the punishments of private reprimand, suspension from the practice of law for a period not exceeding twelve months, and disbarment as the case shall in their judgment warrant, for any of the following causes:

a. Commission of a criminal offense showing professional unfitness;

b. Detention without a bona fide claim there-

to of property received or money collected in the capacity of attorney;

c. Soliciting professional business;

d. Conduct involving willful deceit or fraud or any other unprofessional conduct;

e. Detention without a bona fide claim thereto of property received or money collected in any fiduciary capacity;

f. The violation of any of the canons of ethics which have been adopted and promulgated by the council of the North Carolina State Bar.

(3) May invoke the processes of the courts in any case in which they deem it desirable to do so and formulate rules of procedure governing the trial of any such person. Such rules shall make provision for:

a. Setting forth the charges in the form required for a complaint in a civil action in the superior court.

b. Notice of the charges by the service upon the person charged of a copy of the said complaint. Such service may be made by any officer authorized to serve legal processes wherever the person charged may be found.

c. The right of the defendant to file a written and verified answer in which he may plead any defense to the merits of the charge, the sufficiency of the charge as alleged, or any other defense available to him. All defenses must be asserted by verified answer.

d. The right of the person charged to demand a trial:

1. In the superior court at a regular term for the trial of civil cases by a judge and a jury, or by written agreement of all parties, trial by jury waived and the facts found by the judge, or

2. By a committee of not less than three members of the Bar who are not members of the council and are actively practicing in the State, such committee to be designated by the Supreme Court, or

3. By a committee of not less than three members of the council. The election permitted shall be made in the answer, and if no election is made in the answer the person charged shall be conclusively deemed to have elected to be tried by a committee of the council. If the person charged shall not elect to be tried in the superior court in term as above provided, he shall be conclusively deemed to have waived all right to a trial by jury.

e. The certification, if the person charged shall elect to be tried in the superior court, of the original complaint and answer shall be made to the clerk of the superior court of the county in which such person shall reside if he resides in this State, or to the clerk of the superior court of Wake County if he does not reside in this State. The proceeding shall not be subject to dismissal if certification

is made to the wrong county, but the person charged may move in the superior court to which certification is made for removal to the proper county. After certification all proceedings in connection with the charge shall be conducted in the superior court in term in accordance with the laws and rules relating to civil actions, with right of appeal to the Supreme Court.

f. For the trial of the person charged before a committee (if trial by a jury is waived) selected in accordance with the foregoing provisions, which trial shall conform as nearly as practicable to the procedure provided by law before referees in references by consent with the right to appeal to the superior court by the filing of exceptions with the council and from order or judgment of the council, the entire record shall be filed with the clerk of the superior court of the county in which the person charged resides if he resides within the State, or in Wake County if the person charged does not reside within the State, and thereafter all proceedings in connection with the charge shall be conducted in the superior court in term in accordance with the laws and rules relating to civil actions in which there has been a reference by consent, but neither party shall be entitled to a trial by jury. Both parties shall have the right to appeal to the Supreme Court in accordance with the procedure permitting appeals in civil actions.

Trial before the committee appointed for that purpose by the council, or designated by the

Supreme Court, shall be held in the county in which the accused member resides or if the accused is residing outside of the State, then in Wake County: Provided, however, that the committee conducting the hearing shall have power to remove the same to any county in which the offense, or any part thereof, was committed, if in the opinion of such committee the ends of justice or convenience of witnesses require such removal. The procedure herein provided shall apply in all cases of discipline or disbarments arising under this section.

Whenever the council shall have directed a hearing upon any charges against a member of the bar and said member shall request it to do so, the council shall advise the Supreme Court of the same and request the Supreme Court, through the Chief Justice, to designate a committee of not less than three members of the bar who are not members of the council, and who are actively practicing in the State, to sit as a trial committee to hear the cause; said committee when so designated shall proceed in the same manner as in the case of a committee of the council and under the same procedures set forth herein or as prescribed by rules adopted by the council and approved by the Supreme Court."

Also involved is the application of North Carolina General Statutes 1-194 made applicable to this case by virtue of North Carolina General Statutes 84-28, (3) f, and which reads as follows:

"§ 1-194. Report; review and judgment.—The referee shall make and deliver a report, within the time ordered by the court, to the clerk of the court in which the action is pending. Either party, during the term or upon ten days' notice to the

adverse party out of term, may move the judge to review the report, and set aside, modify or confirm it in whole or in part, and no judgment may be entered on any reference except by order of the judge."

STATEMENT OF FACTS

Petitioner in this Court was the "appellant" in the Supreme Court of North Carolina, and "respondent" in all tribunals below the State Supreme Court. Respondent herein, The North Carolina State Bar, was "appellee" in the Supreme Court of North Carolina, and "complainant" in all tribunals below the State Supreme Court. Petitioner Reginald Lee Frazier is referred to in this Petition as "Petitioner", while The North Carolina State Bar is referred to as "Respondent". The Record before the State Supreme Court is on file in this Court and references are made to it as follows: "(R.p. ....)". Exhibits which were before the State Supreme Court have also been filed in this Court and are referred to in the same manner as they were referred to in the Supreme Court of North Carolina.

This proceeding began with the Chairman of the Grievance Committee directing a letter of notice to the Petitioner, Reginald Lee Frazier, on April 22, 1964. The Chairman of the Grievance Committee notified the Petitioner that the attention of the Grievance Committee and the Council of The North Carolina State Bar had been directed to the case of JAMES HENRY WHITE AND WIFE, WEALTHY WHITE, v. HATTIE McCARTER, REGINALD LEE FRAZIER, INDIVIDUALLY, AND REGINALD LEE FRAZIER, TRUSTEE, which was reported in *261 N.C. 362*, and also to the record in said case in which an appeal had been taken by the Petitioner from a jury verdict against him in the sum of $428.00 in the Superior Court of Craven County in the September-October 1963 term.

The specific charges were as follows:

"From the record in the above entitled case and the testimony and the findings of the jury, you, acting as attorney for Hattie McCarter, accepted the sum of $35.00 to represent her in drawing the deed of trust and note in connection with the sale of two lots; that you did draw the deed of trust wherein you were named as Trustee and that you drew the note making the same payable to Hattie McCarter and you, individually; that you thereafter collected sums totaling $950.00 from James and Wealthy White; that you failed and refused to account to your client for the sum of $428.00 of said amount; that James White and wife secured counsel to have the note and deed of trust marked 'Satisfied and Paid' upon their payment of the balance due on the said note and deed of trust in the sum of $350.00; that after institution of suit against you, both individually and as Trustee, and Hattie McCarter, Hattie McCarter employed counsel and filed a cross action and answer, said cross action demanding an accounting by you and you employed counsel to represent you in the proceeding; that after Hattie McCarter employed counsel to represent her and after her counsel had filed an answer and cross action against you, you did have Hattie McCarter come to your office without the knowledge of her counsel and there undertook to tape record what you state in the record was the examination of said Hattie McCarter and that said recording was made without he knowledge or consent and totally without the knowledge and consent of counsel representing her in the case and that you well knew she had counsel and that you offered this tape recording in evidence in the trial of the action; that at the time you claim you made the tape recording the case was pending for trial in the Superior Court.

"From the record it, therefore, is made to appear that you have detained without a bona fide claim thereto property received or monies collected in your capacity as attorney and in a fiduciary capacity and that such conduct involved willful deceit and fraud and other unprofessional conduct; and that you have otherwise, as

hereinabove set out, violated the Canons of Ethics adopted and promulgated by the Council of The North Carolina State Bar."

The Grievance Committee gave the Petitioner the opportunity to file an answer to these charges. (R.p. 176; Exhibit 4.)

Subsequent to the July 17, 1964, meeting of the Council, and their directives to institute disciplinary proceedings, a summons, notice and complaint were prepared and served on the Petitioner on December 17, 1964, wherein the Respondent, The North Carolina State Bar, alleged in substance that Reginald Lee Frazier was guilty of willful deceit, fraud and unprofessional conduct in connection with his activities in handling the collection of the payments from the Whites to Hattie McCarter; setting out in particular the facts The State Bar was of the opinion which gave rise to these charges. The State Bar also charged that the Petitioner was guilty of unprofessional conduct in taking a recorded conversation between himself and Hattie McCarter who was a cross-plaintiff and Petitioner was a cross-defendant in the then pending action; setting out in particular in the complaint the facts which the State Bar felt constituted unprofessional conduct and a violation of the Canons of Ethics. Subsequent thereto the Petitioner filed an answer wherein he denied retaining any monies belonging to Hattie McCarter, and in his further answer and defense setting up the further defense relative to the recorded conversation with Hattie McCarter and also his limited knowledge of the practice of law at the time the note and deed of trust were prepared which were the subject matter of the civil action which gave rise to this disciplinary proceeding.

Also, in the Petitioner's answer he requested that he be tried before a Trial Committee appointed by the Supreme Court as provided by law. Upon proper request being made, the Supreme Court designated Mr. J. A. Pritchett, of Windsor, Mr. F. E. Wallace, Jr., of Kinston, and Mr. Fred J. Carnage, of Raleigh, as the Trial Committee for the purpose of hearing and taking testimony in this proceeding.

After due notice to counsel representing Respondent and Petitioner, the Trial Committee met at the Courthouse in New Bern, North Carolina, on May 28, 1965, for a pre-trial conference and to hear motions. The Trial Committee elected Mr. Pritchett to serve as Chairman of the Committee.

At the pre-trial hearing the Trial Committee allowed a motion of the Respondent to strike paragraph 2 of the Fourth Further Answer of the Petitioner. The Trial Committee allowed the Petitioner's motion to strike Section 13 and Section 15 of the Complaint. Motions to strike 3, 16, 17, 22, 23, 24, 28, 29, 30, 31, 32, 33, 34 and 36 were denied. And exceptions were duly entered.

At the pre-trial hearing motion was made by Petitioner for an adverse examination of the Secretary of The North Carolina State Bar. Pursuant to the orders of the Trial Committee said examination was held on June 10, 1965, in Raleigh.

This matter came on for hearing before the Trial Committee at the Courthouse in New Bern, North Carolina, on June 28, 1965, at which hearing the Petitioner was present and represented by Messrs. Mitchell, McKissick, Berry and Herman Taylor.

Prior to the offering of any evidence, the Petitioner filed:

(1) A motion to quash or dismiss for lack of due process by reason of refusal to disclose evidence;

(2) A motion to examine the members of the Grievance Committee of The North Carolina State Bar;

(3) A motion to quash or dismiss for lack of due process by reason of procedural irregularities;

(4) The Petitioner renewed his motion to strike which the Committee ruled on adversely previously.

All motions were denied, and Petitioner duly excepted.

The Respondent to support its charges of unethical and unprofessional conduct offered into evidence the entire proceeding of Civil Action No. 7954, entitled JAMES HENRY WHITE AND WIFE, WEALTHY WHITE, v. HATTIE McCARTER, REGINALD LEE FRAZIER, INDIVIDUALLY, AND REGINALD LEE FRAZIER, TRUSTEE, which was on file in the office of the Clerk of Superior Court of Craven County, New Bern, North Carolina, and consisting of Exhibits No. 5 through 5-M. (R.pp. 181-186) The Respondent also offered into evidence the transcript of the testimony of Hattie McCarter in the same Civil Action No. 7954 as the same appears on pages 81 through 113 and 125 through 133 of the transcript of the original action, and designated as Exhibit No. 6 of this proceeding. (R.p. 187) Respondent also introduced the transcript of the recorded conversation between Hattie McCarter and Reginald Lee Frazier in the Civil Action No. 7954 as the same appears on pages 117 through 124 of the transcript of the original action. (R.p. 189) Petitioner offered no evidence. From this evidence and the pleadings of the present complaint which was introduced by the Respondent and so much of the answer which was introduced as appears in the Record, (R.pp. 174-181, 188-189) the Trial Committee made findings of fact, conclusions of law and recommendations as will appear in the Record. (R.p. 80-87)

The Trial Committee concluded as a matter of law that the Petitioner was guilty of corrupt or unprofessional conduct in that he did detain without a bona fide claim monies collected in his capacity as agent and attorney for Hattie McCarter in the sum of $428.00. And further, that the conduct of the Petitioner in conferring with Hattie McCarter during the pendency of the civil action was such that he should be reprimanded. And the Trial Committee recommended that the Petitioner be suspended from the practice of law for a period of 12 months and to pay the costs of the action. The Trial Committee's report was filed January 10, 1966.

The Petitioner filed exceptions and appealed to the Council of The North Carolina State Bar. The proceeding came on

for hearing before the full Council at its meeting on April 15, 1966, and after hearing arguments from both parties, the Council overruled each and every one of the Petitioner's exceptions and the Council's findings of fact I through VI were identical to the findings of fact by the Trial Committee. (R.pp. 133-138) The only difference in the findings of fact of the Council and that of the Trial Committee is that the Trial Committee found as a fact that the Petitioner "detained without bona fide claim thereto money in the sum of $428.00 belonging to Hattie McCarter and collected in his capacity as attorney," which was part of their finding of Fact VII. The Committee further found that he violated the Canons of Ethics by retaining the sum of $428.00 for Hattie McCarter in his capacity as attorney which was finding of fact VIII. The Council did not make such a finding of fact. The Council found only that the Petitioner had violated the Canons of Ethics and particularly Canon 9 by conferring with Hattie McCarter during the pendency of the aforesaid Civil Action No. 7954. And for this violation the Council entered judgment that the Petitioner should be reprimanded and be taxed with the costs of the action.

From this judgment, the Petitioner took exception and appealed to the Superior Court of Craven County. Further, the Petitioner took exception to each and every finding of fact of the Council and likewise renewed his motions and exceptions which were filed to the report of the Trial Committee. The record was forwarded to the Clerk of the Superior Court of Craven County on May 17, 1966, and was placed on the civil issue docket to be heard at the October 3 Term, 1966.

This proceeding came on to be heard before the Hon. Rudolph I. Mintz, Judge Presiding at the October 3 Term, 1966, of the Superior Court of Craven County. Judge Mintz entered an Order affirming findings of fact made by the Council I through VII. The Court made additional findings of fact, VIII through XI, wherein the Court found that the conversation between the Petitioner and Hattie McCarter was recorded without the permission or knowledge of Hattie Mc-

Carter; and that at that time Hattie McCarter was represented by counsel and said conversation was had without the knowledge or consent of said counsel. Further, that the Petitioner detained without a bona fide claim thereto money in the sum of $428.00 belonging to Hattie McCarter and collected in his capacity as attorney. Further, that the Petitioner violated the laws of the State of North Carolina, and specifically G.S. 84-28 (2) b in the collection and retaining of said money. And further, that the Petitioner violated Canon 9 of the Canons of Ethics of The North Carolina State Bar in conferring with Hattie McCarter during the pendency of the Civil Action No. 7954. (R.pp. 154-160)

Upon these facts, the Court concluded that the Petitioner was guilty of corrupt and unprofessional conduct and entered an Order suspending his license for a period of 12 months in connection with detaining without a bona fide claim thereto the money collected in his capacity as attorney; and that he be suspended from the practice of law for a period of six months for his violation of Canon 9 of the Canons of Ethics; said suspensions to run concurrently and that the Petitioner further pay the costs of this action.

From this judgment the Petitioner took exception and appealed to the Supreme Court of North Carolina.

The Opinion of the Supreme Court of North Carolina was filed as Number 120, March 22, 1967. In its Opinion, the Supreme Court of North Carolina overruled all of Petitioner's Exceptions and contentions and affirmed the Judgment of the Superior Court of Craven County, North Carolina.

ARGUMENT

I. DOES THE NORTH CAROLINA STATUTORY PROCEDURE FOR THE DISCIPLINE AND DISBARMENT OF ATTORNEYS DEPRIVE THE PETITIONER OF DUE PROCESS OF LAW?

The Petitioner begins with the conclusion that the instant

case presents classic reasons for the granting of Writ of Certiorari alleging no single novel issue but rather a culmination of Constitutional deprivations contrary to this Court's applicable decisions.

Therefore, we are to be guided in this case by the norms established by this Court to insure an attorney is accorded due process in a disciplinary proceeding.

> "It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in KONIGSBERG v. STATE BAR OF CALIFORNIA, 353 U.S. 252, 77 S. Ct. 722, and SCHWARE v. BOARD OF BAR EXAMINERS, 353 U.S. 232, 77 S. Ct. 752, to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment. While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. ' " Membership in the bar is a privilege burdened with conditions." (MATTER OF ROUSS, 221 N.Y. 81, 84, 116 N.E. 782, 783). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.' People ex rel. KARLIN v. CULKIN, 248 N.Y. 465, 470-471, 162 N.E. 487, 489, 60 A.L.R. 851. The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them in 'good standing' so to do." THEARD v. U.S., 354 U.S. 155, 77 S. Ct. 1274, at page 1276.

As stated in EX PARTE WALL, 107 U.S. 265 at 289, 27 L. ed. 552:

"In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society."' " Cooley's Const. Lim. 353.

"The question, what constitutes due process of law within the meaning of the Constitution, was much considered by this court in Davidson v. New Orleans, 96 U.S. 97; and Mr. Justice Miller, speaking for the court, said: 'It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.' "

It has been the policy of this Court as set forth in SELLING v. RADFORD, 243 U.S. 46, 37 S. Ct. 377, to recognize the judgments of a State Court in this kind of proceeding if it is shown, from a consideration of the record, that the following conditions have been complied with.

1. That the State procedure provided for notice and opportunity to be heard.

2. That there was no infirmity of proof as to the facts found to have established the want of fair private and professional character as to give rise to a clear conviction on the part of the Court that it could, consistently

with its duty, accept as final the conclusions on the subject; and

3. That there was no other grave reason existing which should convince the Court that to allow the natural consequences of the judgment to have their effect, it would conflict with the duty which rests upon the Court not to disbar except upon the conviction that, under the principles of right and justice, the Court be constrained so to do.

NORTH CAROLINA STATUTORY PROCEDURE FOR DISCIPLINE AND DISBARMENT

The North Carolina State Bar, hereinafter referred to as Council, created by Statute (N.C.G.S. Chap. 84, Respondent's Appendix A), acquired jurisdiction and instituted this proceeding by virtue of N.C.G.S. 84-28, (1), (2):

"§ 84-28. Discipline and disbarment.—The Council or any committee of its members appointed for that purpose, or designated by the Supreme Court,

(1) Shall have jurisdiction to hear and determine all complaints, allegations, or charges of malpractice, corrupt or unprofessional conduct, or the violation of professional ethics, made against any member of the North Carolina State Bar;

(2) May administer the punishments of private reprimand, suspension from the practice of law for a period not exceeding twelve months, and disbarment as the case shall in their judgment warrant, for any of the following causes:

a. Commission of a criminal offense showing professional unfitness;

b. Detention without a bona fide claim thereto of property received or money collected in the

capacity of attorney;

c. Soliciting professional business;

d. Conduct involving willful deceit or fraud or any other unprofessional conduct;

e. Detention without a bona fide claim thereto of property received or money collected in any fiduciary capacity;

f. The violation of any of the canons of ethics which have been adopted and promulgated by the council of the North Carolina State Bar."

The Petitioner was allowed to elect from four different methods by which he could be tried as provided by N.C.G.S. 84-28, (3):

"(3) May invoke the processes of the courts in any case in which they deem it desirable to do so and formulate rules of procedure governing the trial of any such person. Such rules shall make provision for:

a. Setting forth the charges in the form required for a complaint in a civil action in the superior court.

b. Notice of the charges by the service upon the person charged of a copy of the said complaint. Such service may be made by any officer authorized to serve legal processes wherever the person charged may be found.

c. The right of the defendant to file a written and verified answer in which he may plead any defense to the merits of the charge, the sufficiency of the charge as alleged, or any other defense available to him. All defenses must be asserted by verified answer.

d. The right of the person charged to demand a trial:

1. In the superior court at a regular term for the trial of civil cases by a judge and a jury, or by written agreement of all parties, trial by jury may be waived and the facts found by the judge, or

2. By a committee of not less than three members of the Bar who are not members of the council and are actively practicing in the State, such committee to be designated by the Supreme Court, or

3. By a committee of not less than three members of the council. The election permitted shall be made in the answer, and if no election is made in the answer the person charged shall be conclusively deemed to have elected to be tried by a committee of the council. If the person charged shall not elect to be tried in the superior court in term as above provided, he shall be conclusively deemed to have waived all right to a trial by jury.

e. The certification, if the person charged shall elect to be tried in the superior court, of the original complaint and answer shall be made to the clerk of the superior court of the county in which such person shall reside if he resides in this State, or to the clerk of the superior court of Wake County if he does not reside in this State. The proceeding shall not be subject to dismissal if certification is made to the wrong county, but the person charged may move in the superior court to which certification is made for removal to the proper county. After certification all proceedings in connection with the charge shall be conducted in the superior court in term in accordance with the laws and rules relating to civil actions, with right of appeal to the Supreme Court."

His election was not required until after he had been served with a Complaint setting forth the charges upon which he was to be tried.

Once the election was made by the Petitioner to be tried by a Trial Committee appointed by the Supreme Court, as provided by N.C.G.S. 84-28, (3) d 2, the procedure to be then followed was governed by N.C.G.S. 84-28 (3) f:

> "f. For the trial of the person charged before a committee (if trial by a jury is waived) selected in accordance with the foregoing provisions, which trial shall conform as nearly as practicable to the procedure provided by law before referees in references by consent with the right to appeal to the superior court by the filing of exceptions with the council and from order or judgment of the council, the entire record shall be filed with the clerk of the superior court of the county in which the person charged resides if he resides within the State, or in Wake County if the person charged does not reside within the State, and thereafter all proceedings in connection with the charge shall be conducted in the superior court in term in accordance with the laws and rules relating to civil actions in which there has been a reference by consent, but neither party shall be entitled to a trial by jury. Both parties shall have the right to appeal to the Supreme Court in accordance with the procedure permitting appeals in civil actions."

The procedure to be followed by the Trial Committee is set out in the remainder of N.C.G.S. 84-28:

> "Trial before the committee appointed for that purpose by the council, or designated by the Supreme Court, shall be held in the county in which the accused member resides or if the accused is residing outside of the State, then in Wake County: Provided, however, that the committee conducting the hearing shall have power to remove the same to any county in which the offense, or any part thereof, was committed, if in the opinion of such committee the ends of justice or convenience of witnesses require such removal. The procedure herein provided shall apply in all cases of discipline or disbarments arising under this section.

> "Whenever the council shall have directed a hearing upon any charges against a member of the bar and said member shall request it to do so, the council shall advise the Supreme Court of the same and request the Supreme Court, through the Chief Justice, to designate a committee of not less than three members of the bar who are not members of the council, and who are actively practicing in the State, to sit as a trial committee to hear the cause; said committee when so designated shall proceed in the same manner as in the case of a committee of the council and under the same procedures set forth herein or as prescribed by rules adopted by the council and approved by the Supreme Court."

The rules as adopted by the Council and approved by the Supreme Court for the procedure of the trial are reproduced herein as Respondent's Appendix "B".

From a review of this procedure and the record, it can readily be seen that these Rules do not offend any principle of justice so rooted in the traditions and conscience of the people of the United States as to be ranked as fundamental and are well within the power of the State to promulgate such procedures in order to carry out its laws. SPEISER v. RANDALL, 357 U.S. 424, at 525, 78 S. Ct. 1332 at 1341.

The Petitioner chose to exercise his right to file exceptions to the findings of fact, conclusions of law and order and judgment of the Council in accordance with G.S. 84-28 (3) f. The entire record of this proceeding was filed with the Clerk of Superior Court of Craven County, the county of Petitioner's residence.

G.S. 84-28 (3) f provides further:

> "Thereafter all proceedings in connection with the charge shall be conducted in term IN ACCORDANCE WITH THE LAWS AND RULES RELATING TO CIVIL ACTIONS IN WHICH THERE HAS BEEN A REFERENCE BY CONSENT, BUT NEITHER PARTY SHALL BE ENTITLED TO A TRIAL BY JURY."

Upon the hearing in the Superior Court with exceptions having been filed by the Petitioner to each and every finding of fact, conclusion of law, and to the order and judgment of the Council and also with the renewal of Petitioner's exceptions to the report of the Trial Committee, this case and the entire record were before the Superior Court for review. The Court under the provisions of N.C.G.S. 84-28 (3) f and N.C.G.S. 1-194 could then affirm, amend, modify, set aside, make additional findings, and confirm in whole or in part or disaffirm the findings, conclusions, and order of the Council and Trial Committee.

> "If the reference is by consent, the purpose of the exceptions is to bring the controversy into focus for the trial judge who, 'in the exercise of his supervisory power and under the statute (NCGS 1-194), may affirm, amend, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee . . . THIS HE MAY DO, HOWEVER, ONLY IN PASSING UPON EXCEPTIONS, FOR IN THE ABSENCE OF EXCEPTIONS TO THE FACTUAL FINDINGS OF A REFEREE, SUCH FINDINGS ARE CONCLUSIVE . . . , and where no exceptions are filed, the case is to be determined upon the facts as found by the referee.' (Emphasis added.) ANDERSON v. McRAE, 211 NC 197, 189 SE 639." COBURN v. TIMBER CORP., 257 NC 222 at 226, 125 S.E. 2d 593; N.C.G.S. 1-194; N.C.G.S. 1-195.

In BOARD OF DENTAL EXAMINERS v. GRADY, 268 NC 541, 151 SE 2d 25, 1966, the North Carolina Supreme Court considered a similar statutory procedure as it related to the practice of dentistry. The procedure for appeal from a decision of the North Carolina State Board of Dental Examiners provides that "upon appeal in the Superior Court the same shall be heard in the Superior Court as in the case of consent reference." N.C.G.S. 90-41.

The Supreme Court of North Carolina said, in GRADY, Supra, p. 543, 544,

"While the evidence was sufficient to support the Board's findings of fact, it appears that in the Superior Court the matter was not 'heard . . . as in the case of consent references' as required by N.C.G.S. 90-41. To the end that it may be, it is remanded to the Superior Court of Wake County.

"In a consent reference the judge is expected to rule upon the report somewhat in the capacity of a jury. He is not expected to approve the work of the referee merely because the evidence will support it. He should weigh it and make his own independent determination of the truth of the matters in dispute.

" 'The importance of faithful observance of these principles by the judge cannot be exaggerated for a twofold reason. His review is designed to clear away errors of the referee. Besides, facts found by the judge on his review of the referee's report are accepted as final on appeal to this Court if they are supported by testimony.' MACON v. MURRAY, 231 NC 61, 55 SE 2d 807."

The Petitioner contends that the jurisdiction of the Superior Court, when it was appealed by the Petitioner, constituted a denial of judicial review. This he claims on the basis that it ceased being a Statutory proceeding and became a judicial inquiry, citing COLE v. ARKANSAS, 333 U.S. 196, 68 S. Ct. 514, 92 L. ed. 644. COLE is clearly inapplicable. Involved there was a criminal conviction being sustained by a State Court on appeal on an entirely different charge from that in which the defendant was tried below. The issue arising from the charges of wrongful detention of money has remained the same since the institution of the original civil action, WHITE v. McCARTER, 261 NC 362, 134 SE 2d 612. The North Carolina Supreme Court stated therein, "McCarter's cross-action against Frazier raises the simple question of whether Frazier has fully accounted for the $900.00 collected by him, and if not the amount of his default".

In RE MacKAY (Alaska) 416 P 2d 823 (1964), 382 U.S.

803, 15 L ed. 256, 86 S. Ct. 28, Cert. Deferred; 384 U.S. 1003, 865 S. Ct. 1907, Cert. Denied; 87 S. Ct. 11, Rehearing Denied, is in point. The Supreme Court of Alaska, although traveling a somewhat different road procedurally, reached the same conclusion as was reached in the instant case. There a trial committee had ordered a suspension of not more than six months. The Board of Governors, comparable to The North Carolina State Bar Council, determined that no disciplinary action should be taken. The Supreme Court of Alaska, on its own motion based upon the record below, exercised its inherent right to and did disbar one of its own members.

Whether it is called statutory inquiry at the Superior Court level or whether it is called a judicial inquiry, the record will reveal that the Superior Court was considering the entire record based upon exceptions and assignments of error made by the Petitioner to each and every finding of fact, conclusion of law and judgment, to the Trial Committee's report and the judgment of the Council which included its findings of fact, conclusion and judgment. As quoted in EX PARTE WALL, Supra, at 273, "the question is, whether, after the conduct of this man, it is proper that he should continue as a member of a profession which should stand free from all suspicion . . . . it is not by way of punishment; but the Court in such ca[illegible] exercises their discretion, whether a man whom they had [illegible]erly admitted is a proper person to be continued on [illegible] roll or not".

The Petitioner would lead you to believe that this is an appeal from an administrative agency to the Superior Court and is governed by the general law of appeal to an appellate body from an administrative body. North Carolina has in full force and effect the Uniform Laws on Revocation of Licenses, N.C.G.S. Chap. 150. These laws apply to C.P.A.s, architects, barbers, chiropodists, etc. N.C.G.S. 150-9. Attorneys at law are governed by the Statutory provision previously set out, N.C.G.S. Chap. 84, and the law applicable thereto as hereinbefore quoted.

The North Carolina Statutory method for review by the

Superior Court of the actions of the Council does not "fetter" or "hamstring" the Petitioner to judicial review. Contrarily, the way the North Carolina Supreme Court has interpreted reference by consent, it was the power of the Petitioner to "hamstring" or "fetter" the inquiry which the Court should make on review. ANDERSON v. McRAE, Supra.

THE RIGHT TO INSPECT THE MINUTES OF THE GRIEVANCE COMMITTEE OF THE BAR AND ADVERSELY EXAMINE THE MEMBERS OF THE GRIEVANCE COMMITTEE

II. DID THE MANNER IN WHICH PETITIONER WAS ALLOWED TO INSPECT THE MINUTES OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR VIOLATE ANY OF HIS CONSTITUTIONAL RIGHTS?

The Petitioner contends that the Superior Court should have dismissed the proceeding because of the ruling the Trial Committee made upon Petitioner's request for permission to examine the Minutes of The North Carolina State Bar Council. This contention is without merit. A careful examination of the record and the ruling and action of the Trial Committee will reveal that the Trial Committee afforded the Petitioner and his counsel all rights with respect to the examination of the Minutes of The North Carolina State Bar to which he was entitled. Pursuant to the order of the Trial Committee entered at the pre-trial hearing held on May 28, 1965, an adverse examination was had of the Secretary of The North Carolina State Bar on June 10, 1965. (R.p. 87, 88)

Prior to the pre-trial examination, counsel for the Petitioner in correspondence addressed to counsel for the Respondent requested that "Mr. Cannon have present with him all Minutes of the Bar Council, of the Grievance Committee or any sub-committee thereof which relate to the charges against Mr. Frazier and which, in part, touched upon all or any proposed disciplinary action against Mr. Frazier." (R.pp. 59, 108)

At the adverse examination, certified copies of the Minutes

relating to the Petitioner were presented to his counsel. (R.p. 108) The Petitioner and his counsel were afforded the opportunity at that time to examine the Minutes as they related to him. (R.p. 109) Counsel for Respondent was of the opinion at that time, and still is, that he did not have the authority to permit an inspection of the State Bar Council Minutes as they related to other grievance matters against other attorneys. Counsel for the Petitioner was of a similar opinion and stated: "that this is not the type of thing we want public". (R.pp. 107, 109.)

At the adverse examination, the counsel for Petitioner were advised in response to an oral request, made for the first time at said adverse examination, that if they were of the opinion that they were entitled to examine the Minutes with respect to other matters considered by the Council of The North Carolina State Bar on the same date as matters relating to Reginald Lee Frazier were considered that they could have a subpoena duces tecum issued by an appropriate court official. (R. p. 109) This the Petitioner has failed to do.

A careful examination of the record will reveal that the Petitioner requested that he be given an opportunity to examine the full Minutes of the Grievance Committee and the Council only for the days when the matters affecting Reginald Lee Frazier were considered.

The motion of the Petitioner made before the Trial Committee (R. pp. 52-54), in part, is as follows:

"(2) That the Hon. Committee instruct Hon. Edward L. Cannon and his agents, assistants and employees to permit Petitioner to fully peruse the Minutes and entries of Complainant in the manner and spirit of Petitioner's request as made upon the adverse examination of June 10, 1965."

The request made at the adverse examination was for the Minutes of:

> April 17, 1964; July 17, 1964; October 22, 1964; January 15, 1965; April 16, 1965. (R. p. 108)

Further reference is made to the colloquy which took place between the Chairman of the Trial Committee and counsel for the Petitioner. (R. pp. 55-68)

At R.p. 57, Mr. Mitchell, of counsel for Petitioner, said: "Our contention is this: that we wanted to see the full minutes of the Grievance Committee on the days in which Mr. Frazier's matter was held in order that we could compare what was done in Mr. Frazier's case and what was done in the other cases."

Mr. McKissick, of counsel for Petitioner, at R.p. 58, said, "And the minutes—we have been handed certain portions, extracts or parts of the minutes, have been, certified have been given to us but what we want to see and be better prepared and to defend Mr. Frazier, is, of course, the entire minutes and proceedings of that date because it goes clearly to a matter of time and preparation relating to the record itself. The minutes that were had on the 16th and the decision was rendered on the 17th, within a period of 24 hours where a complete record before the Supreme Court was read and a decision made. This goes clearly to raise a procedure of due process point."

Further reference is made to the statement of Mr. Taylor, of counsel for the Petitioner: (R. p. 66) ". . . Now, we take this position: that it is not our purpose to go into these minutes to make inquiry with respect to other attorneys that have had complaints against them."

Based upon this response to its inquiry, the Trial Committee made its ruling. Mr. Pritchett: (R. p. 65) "Well, let the record show that the Trial Committee has offered to permit inspection of the records requested by defense counsel in the presence of the Trial Committee. Now, do you still refuse to do that?"

At R. p. 67 of the Record, quoting the Chairman: "All right, now, let's get this in the record: the Committee will give you an opportunity now to examine the records of the

dates requested and permit you to have the benefit of anything in the records pertaining to the Petitioner Frazier. We will not permit you to use the minutes as to any other attorney whose name you might find in the minutes. We'll let you inspect them to see any names in there but not let you use that information to go into the record in defense of the Petitioner Frazier because we do not think that it is pertinent."

The record further reflects that the requested examination of the Minutes was made by counsel for the Petitioner. (R. p. 68)

The Petitioner had the right and opportunity to prepare his defense. His motion to adversely examine the Grievance Committee was not relevant. He was tried on the issues joined by the Complaint and Answer in this proceeding. His motion was not timely as the record reveals that it was not filed until the day of the hearing before the Trial Committee some twelve months subsequent to the first Letter of Notice being directed to the Petitioner on April 22, 1964.

III. WAS THE PETITIONER DEPRIVED OF DUE PROCESS BY THE NATURE OF THE EVIDENCE WHICH WAS INTRODUCED AGAINST HIM?

In North Carolina a disciplinary proceeding is in the nature of a civil action. IN THE MATTER OF EBBS, 150 N.C. 45, (1908), 63 S.E. 190. Therefore, the rules of admissibility of evidence are to be governed by the ordinary rules of civil procedure.

The essential evidence offered by the Respondent upon the hearing consisted of:

(a) Admissions contained in the Answer of Petitioner.

(b) The record of the prior Civil Action No. 7954 entitled White v. McCarter on file in the office of the Clerk of Superior Court of Craven County.

(c) The transcript of the testimony of one Hattie McCarter given in the civil action.

(d) The transcript of the recorded conversation between Petitioner and Hattie McCarter introduced upon the trial of the prior civil action.

The Complaint should contain a concise statement of the ultimate facts constituting the cause of action together with a demand for the relief to which Plaintiff supposes himself to be entitled and nothing more. STRONG'S N. C. INDEX, VOL. 3, PLEADINGS, Sec. 2, p. 600.

"Allegations of distinct, separate and pertinent facts which are admitted in the pleading of the adverse party are competent, . . . where a fact is admitted, it is as binding on the party as if found by the jury, and no evidence in support thereof is necessary." STRONG'S N. C. INDEX, VOL. 2, EVIDENCE, Sec. 20, p. 264.

The Petitioner has alleged that the Respondent at the outset in drafting of its Complaint intended to shift the burden of proof to the Petitioner.

A review of the pleadings in this proceeding will reveal that the Petitioner's allegation is without mertit and at no time did The North Carolina State Bar attempt to shift the burden of proof on the Petitioner.

The law on the admissibility of the record of WHITE V. McCARTER, Supra, is best discussed in the case of IN RE SANTOSUOSSO, 318 Mass. 489, 62 N.E. 2d 105, 161 ALR 892. In that case, which was an inquiry into certain alleged misconduct of Santosuosso, an attorney, upon a petition of the Bar Association of the City of Boston, the petitioner offered in evidence the entire printed record in the files of the Clerk of Superior Judicial Court for the Commonwealth of Massachusetts in a civil case in equity in which Santosuosso had been a defendant, and the findings and order in the case. Santosuosso objected that the evidence was not admissible

under the doctrine of *res adjudicata* and also that apart from the doctrine of *res adjudicata* the statements made by a Judge in his findings and decree were not admissible as evidence. The Court held that the paramount considerations supporting proceedings to investigate the worthiness of members of the Bar to practice law cannot be defeated by the application of rules of evidence governing trial of adversary proceedings between parties and that the necessity for the preservation of the integrity of the courts and the safety of the public rises above strictly technical rules of evidence that govern such adversary proceedings between parties. The Supreme Court of Mass. at p. 107 said:

> "We are of the opinion that the evidence contained in the record offered by counsel designated by the court to conduct the proceeding that is the evidence adduced at the hearing in the Superior Court of the equity suit in question, at which the respondent, a party thereto, was present and represented by counsel, testified and had full opportunity to present and examine witnesses and to cross-examine those called by the plaintiff, is admissible in the present inquiry. See STATE, ex rel. NEBRASKA STATE BAR ASS'N., v GUDMUNDSEN, (145) Neb. (324), 16 NW 2d 474. We reach this conclusion without dependence upon such cases as SELLING v RADFORD, 243 US 46, 37 S. Ct. 377, 61 L. ed. 585, Ann. Cas. 1917D, 569, and MATTER OF ULMER, 268 Mass. 373, 167 NE 749, in each of which a judgment of disbarment in another judisdiction (sic) was held to settle the issue that the attorney in question was unfit to practice. We are unwilling to attach such conclusive effect to a judgment at law or a final decree in equity, based upon alleged corrupt conduct on the part of a defendant attorney, where the judgment or final decree entered rests upon findings that the attorney has been guilty of corrupt conduct . . . we are of the opinion that the evidence in the proceeding in equity in question is admissible in an inquiry such as the present, and like any other evidence is to be given such weight as the single justice shall deem proper, when considered together with all

other evidence that the respondent may produce at the hearing, in the course of which he must be heard with full opportunity to present all relevant evidence that he may wish to adduce.

"The foregoing view finds support in such cases as IN RE LACY, 234 Mo. App. 71, 112 SW 2d 594; IN RE PATE, 232 Mo. App. 478, 119 SW 2d 11; STATE, ex rel. NEBRASKA STATE BAR ASS'N., v GUDMUNDSEN, 145 Neb. 324, 16 NW 2d 474; WERNER v. STATE BAR, 24 Cal. 2d 611, 150 P. 2d 892, and FAIRFIELD COUNTY BAR v TAYLOR, 60 Conn. 11, 22 A. 441, 13 LRA 767. See also MATTER OF BECKER, 229 App. Div. 62, 65-66, 241 NYS 369; Id., 255 NY (223) 233, 174 NE 461; Wigmore on Evidence, 3d ed. S4 (7)."

It is true that in those cases wherein the entire record is admitted, it is on the theory that a disciplinary proceeding is not a true adversary proceeding or that the proceeding is a *sui generis*. But it is likewise true wherein the record was admitted in the disciplinary proceeding the attorney had been a party in which he appeared in person and by counsel and cross-examined the witness against him and the disciplinary proceeding was based upon an adjudication of misconduct personal to him, RE SANTOSUOSSO, supra; NEBRASKA STATE BAR ASS'N. v GUDMUNDSEN, 145 Neb. 324, 16 NW 2d 474; or arose out of evidence taken in a criminal proceeding against the attorney, WERNER v STATE BAR, 24 Cal. 2d 611, 150 P. 2d 892; RE LACY, 234 Mo. App. 71, 112 SW 2d 594; or the records, including testimony, in civil actions against the attorney were on claims arising out of same facts upon which the disciplinary charges against him were based, PEOPLE OF THE STATE OF COLORADO v HOWARD, ATTORNEY-RESPONDENT, 364 P. 2d 380. Cert. Denied March, 1962, 369 US 819.

Likewise, in those cases wherein the record was not admissible, it is found that there was not a true opportunity to cross-examine wherein the attorney in the disciplinary proceeding was not a party to the prior civil action. TEN-

NESSEE BAR ASS'N. v. FREEMAN, 362 SW 2d 828. FREEMAN also cites the several jurisdictions adhering to the strict rules of evidence applying in disciplinary proceedings. These cases are collected and discussed in Anno. 161 ALR 898, et seq., wherein it is pointed out, at page 907, RE EBBS, supra, as authority that a judgment or decree of his conviction in another State would be competent evidence of his guilt in a disciplinary proceeding.

Where the disciplinary proceeding stands upon the very charges brought out in the prior civil action wherein the attorney was a party, represented by counsel, participated in the trial and had the opportunity to and did cross-examine the witnesses, then the purpose of a judicial proceeding has been satisfied in its search for the truth. This record should be admissible in the disciplinary proceeding and, like any other evidence, be given such weight as deemed proper when considered together with all other evidence including that which the respondent may produce at the hearing.

Petitioner's argument "relates to 'Reception in evidence of hearsay evidence pertaining to a civil action in which parties issues and proceedings are dissimilar' to those in the instant case. While the parties are not technically the same, the inquiry is entirely based on the alleged unethical conduct of the respondent in his dealings with his aged and illiterate client, Mrs. Hattie McCarter. So was the civil action in which he was found by the jury to have withheld the money of his client while acting as her agent and attorney". STATE BAR v. FRAZIER, Supra, at p. 371.

Transcript of discussions between Judge and counsel for bankruptcy trustee in bankruptcy proceedings in which attorney's alleged misconduct in presenting a claim for services arose was admissible in a subsequent disbarment proceeding. STATE OF OKLAHOMA v. O'BRYAN, 385 P 2d 876, Appeal Dismissed, Cert. Denied, 376 US 649, 11 L. ed. 2d 980, 84 S.C. 983.

And a State disbarment proceeding record received in

evidence in Federal disbarment proceeding, encompassing records of civil cases in which his conduct was drawn in question, did not deny him any constitutional rights, where the attorney had been a party to the cases and had full opportunity to examine and cross-examine witnesses. HOWARD v. U. S. DISTRICT COURT FOR THE DISTRICT OF COLORADO, 318 Fed. 2d 521. There the Circuit Court in this case succinctly stated the rule: "Howard insists that the State proceedings denied him due process and the right of confrontation by the receipt of the records in the civil cases against him". This point was presented to the Colorado Supreme Court which upheld the use of the records. *Recognizing that the States' decisions are split on this point, we find no denial of any constitutional rights.* At p. 523. (Emphasis added.)

Further the record of a civil case was introduced in a disbarment proceeding before the patent office although the attorney in question was not a party of the prior civil action. KINGSLAND v. DORSEY, 70 S. Ct. 123, 338 U.S. 318.

It is well established that a defendant in a criminal action in State or Federal Court has the right to confront the witnesses against him. POINTER v. STATE OF TEXAS, 380 U.S. 400, 85 S. Ct. 1065.

But as to this fundamental right, there are recognized exceptions such as dying declarations and testimony of a deceased witness who has testified at a former trial, and other analogous situations. POINTER v. STATE OF TEXAS, Supra. 1069, 1070.

Subsequent to the trial of the civil matter and prior to the hearing in the disciplinary proceeding, Hattie McCarter died. (R. p. 187) Hattie McCarter was a defendant in the original civil action and a cross-plaintiff as to the Petitioner who was a defendant in the original action and a cross-defendant in Hattie McCarter's civil action. She testified in the original action and was cross-examined by the Petitioner. The Respondent in this action offered into evidence that portion of

the transcript of the former proceeding relating to the testimony of Hattie McCarter.

Due to the death of Hattie McCarter her prior testimony not only qualifies for admission, but makes it pertinent and permits a trial of the issue between the Respondent and Petitioner upon its merits, and any other rule would sacrifice substance to form and exclude material evidence which has been subjected to the test of truth and in favor of a party who had an opportunity to cross-examine. HARTIS v ELECTRIC RR, 162 NC 236 (1913), 78 S.E. 164.

In a disbarment proceeding, IN RE FALZONE, 220 SW 2d 765 (Mo., 1949), wherein the transcript of testimony given before a State Senate on charges that the accused had solicited a bribe, was offered into evidence in the later disciplinary proceeding the Court concluded:

> "Furthermore, the issue before the Senate was identical with the issue before the Special Commissioner; and Mrs. MacCallum's testimony was given under oath and subject to cross-examination by the accused or his counsel. That the complaining or prosecuting parties were not identical in the two instances is immaterial so long as the evidence was to be used against the accused, who was the same in both cases. Absolute identity or direct privity of interest is only required in the case of the one against whom the evidence is to be used so as to vouchsafe the opportunity for effective cross-examination."

Where prior testimony has not been received in evidence in North Carolina the facts in each case will reveal that there was no opportunity of the party against whom the evidence was offered to cross-examine the testimony in the prior proceeding, McLEAN v SCHEIBER, 212 NC 544 (1937), 193 S.E. 708; the subject matter of the subsequent civil action was not the same as the prior civil action; BRYAN v MALLOY, 90 N.C. 508; or proper foundation had not been laid prior to offering the testimony. BANK v. WHILDEN, 175 N.C. 52, 94 S.E. 723. Where all the rules have been complied with the

Court has received the prior testimony as competent evidence. STEWART v REGISTER, 108 N.C. 588, 13 S.E. 234; MABE v MABE, 122 N.C. 552, 29 S.E. 843, HARTIS v ELECTRIC RR, Supra.

From the record in the former action, WHITE v McCARTER, Supra, it is apparent that the subject matter and issues under consideration in the disciplinary proceeding, STATE BAR v FRAZIER, Supra, were the identical subject and question presented in the prior civil proceeding. The Supreme Court stated in WHITE v. McCARTER, Supra, at p. 613,

> "McCarter's cross action against Frazier raises the simple question of whether Frazier has fully accounted for the $900.00 collected by him and, if not, the amount of his default."

Mrs. McCarter died after the trial of the civil case and before the hearings of the Committee. Her testimony at the trial of the civil action is clearly admissible in this proceeding. It meets all the requirements so clearly and concisely stated in Stansbury on Evidence, 2d Ed. Sec. 145, and quoted by the North Carolina Supreme Court in STATE BAR v FRAZIER, Supra, at pp. 371, 372, "the testimony of a witness at a former trial or other judicial hearing (which) may be given in evidence at a subsequent trial, whether civil or criminal, if it complies with all of the following conditions:

> "(1) If the witness has since died, or become incapacitated by insanity or illness, or has removed from the jurisdiction or has otherwise become unavailable to testify as a witness at the present trial.
>
> "(2) If the proceeding at which he testified was a former trial of the same cause, or a preliminary stage of the same trial, or the trial of another cause involving the same issue and subject matter as the one to which his evidence is directed at the present trial.

"(3) If the parties at the former trial were the same as those at the present trial, or in privity with them, or if the situation was such that the party against whom the evidence was then offered had the same opportunity and motive to cross-examine the witness as the party against whom it is now offered has at the present trial.".

Likewise a review of the record in the case of WHITE v. McCARTER as shown in the exhibits forwarded to this Court will conclusively reveal that the Petitioner, Reginald Lee Frazier, was called to account for such monies as may be shown to the Court as having been paid to him by the Whites for Hattie McCarter. This conclusively shows that the Petitioner was called to account for his actions as attorney and agent of one Hattie McCarter in the handling of monies belonging to Hattie McCarter and collected in his capacity as an attorney. At no time has the Petitioner been faced with the burden of seeking access of the civil courts of the State of North Carolina over a disputed "debt" with the possibility of disciplinary proceeding if he failed to succeed in his claim. An attorney at law is entitled to all rights and privileges guaranteed by the United States Constitution and the North Carolina Constitution as any citizen. But once his conduct comes into question in his capacity as attorney at law it is the duty of The North Carolina State Bar and the Courts to make due inquiry. EX PARTE WALL, Supra.

The Petitioner has contended from the beginning that the proceeding was null and void due to the fact that there was no sworn Complaint initiated against him by any complaining party. The Council of the State Bar may initiate proceedings against an attorney for disbarment or suspension of license upon information of unethical conduct received from any source, and it is not required that its proceedings be based upon a complaint of a client being defrauded by an attorney. STATE BAR v. FRAZIER, Supra; EX PARTE WALL, Supra; RANDALL v. BRIGHAM, 7 Wall 523, 19 L. ed. 285.

VIOLATION OF CANON 9 OF THE CANONS OF THE NORTH CAROLINA STATE BAR

9. Negotiations with Opposite Party

"A lawyer should not in any way communicate upon the subject or controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

The Petitioner does not dispute by now the recorded conversation between himself and one Hattie McCarter during a pending law suit when Mrs. McCarter was then represented by counsel. The Petitioner contends that the conversation was at the instance of Hattie McCarter and no harm intended. (R.pp. 28, 31-33) From a reading of the transcript of the recorded conversation as found in the exhibits this Court can readily see the tenor of the conversation and the actions which the Petitioner was attempting to carry out and further that the conduct of the Petitioner during the pendency of the civil action was in such a manner that he was more worried over the seriousness and effect Hattie McCarter was having over his professional career. (R. p. 33).

It is no less serious a violation of the Canons of Ethics as promulgated and adopted by The North Carolina State Bar than it is a violation of the Statutory provisions of N.C.G.S. 84-28.

CONCLUSIONS

In this proceeding, the Petitioner received adequate notice of the charges against him and was granted an impartial opportunity to be heard. His rights—constitutional or statutory—have been jealously guarded to the end that the Petitioner was granted a fair trial. The rights of the Petitioner have not been violated and therefore, this Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED

John H. Anderson
Attorney at Law
Wachovia Bank Building
Raleigh, North Carolina

Robert D. Rouse, Jr.
Attorney at Law
Farmville, North Carolina

COUNSEL FOR THE NORTH CAROLINA
STATE BAR

Appendix "A"

Statutory Provisions Respecting Attorneys at Law

General Statutes of North Carolina

Chapter 84.

Attorneys at Law.

Article 4.

North Carolina State Bar.

Sec.

84-15 Creation of North Carolina State Bar as an agency of the State.
84-16. Membership and privileges.
84-17. Government.
84-18. Election of councilors.
84-19. Change of judicial districts.
84-20. Compensation of councilors.
84-21. Organization of council; publication of rules, regulations and by-laws.
84-22. Officers and committees of the North Carolina State Bar.
84-23. Powers of council.
84-24. Admission to practice.
84-25. Fees of applicants.
84-26. Pay of Board of Law Examiners.
84-27. [Repealed.]
84-28. Discipline and disbarment.
84-29. Concerning evidence and witness fees.
84-30. Rights of accused person.
84-31. Designation of prosecutor; compensation.

84-32. Records and judgments and their effect; restoration of licenses.
84-33. Annual and special meetings.
84-34. Membership fees and list of members.
84-35. Saving as to North Carolina Bar Association.
84-36. Inherent powers of courts unaffected.
84-37. State Bar may investigate and enjoin unauthorized practice.
84-38. Solicitation of retainer or contract for legal services prohibited; division of fees.

ARITCLE 4.

North Carolina State Bar

§ 84-15. Creation of North Carolina State Bar as an agency of the State.—There is hereby created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina State Bar.

§ 84-16. Membership and privileges.—The membership of the North Carolina State Bar shall consist of three classes, active, honorary and inactive.

The active members shall be all persons who shall have heretofore obtained, or who shall hereafter obtain, a license or certificate, which shall at the time be valid and effectual, entitling him to practice law in the State of North Carolina, who shall have paid the membership dues hereinafter specified, unless classified as an inactive member by the council as hereinafter provided. No person other than a member of the North Carolina State Bar shall practice in any court of the State, except foreign attorneys as provided by statute.

The honorary members shall be:

(1) The Chief Justice and associate justices of the Supreme Court of North Carolina;

(2) The judges of the superior courts of North Carolina;

(3) All former judges of the above-named courts resident in North Carolina, but not engaged in the practice of law;

(4) Judges of the district courts of the United States and of the circuit court of appeals resident in North Carolina.

Inactive members shall be all persons found by the council to be not engaged in the practice of law and not holding themselves out as practicing attorneys and not occupying any public or private positions in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document, or law.

Only active members shall be required to pay annual membership fees, and shall have the right to vote. A member shall be entitled to vote at all annual or special meetings of the North Carolina State Bar, and at all meetings of and elections held by the bar of each of the judical districts in which he resides: Provided, that if he desires to vote with the bar of some district in which he practices, other than that in which he resides, he may do so upon filing with the resident judge of the district in which he desires to vote, and with the resident judge of the district in which he resides (and, after the North Carolina State Bar shall have been organized as hereinafter set forth, with the secretary-treasurer of the North Carolina State Bar), his statement in writing that he desires to vote in such other district: Provided, however, that in no case shall he be entitled to vote in more than one district.

§ 84-17. Government.—The Government of the North Carolina State Bar shall be vested in a council of the North Carolina State Bar, hereinafter referred to as the "council," consisting of one councilor from each judicial district of the State, to be appointed or elected as hereinafter set forth, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar whose term

expires after October 1, 1961, who shall be a councilor for a term of three years from the date of the expiration of his term as president. Nothwithstanding any provisions of this article as to the voting powers of members, the council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters, except as otherwise directed or overruled, as in § 84-33 provided. The councilors elected shall serve as follows: Those elected from the first, fourth, seventh, tenth, thirteenth, sixteenth, and ninetenth districts shall serve for one year from the date of their elections; those elected from the second, fifth, eighth, eleventh, fourteenth, seventeenth, and twentieth districts shall serve for two years from the date of their election; and those elected from the third, sixth, ninth, twelfth, fifteenth, and eighteenth districts shall serve for three years from the date of their election: Provided, that upon the election of successors to the councilors first elected, the term of office and the period for which such councilors are elected shall be three years from the date of election.

All councilors elected from any additional judicial district will be elected for a term of three years, except as may be hereinafter provided in G. S. 84-18 and G. S. 84-19.

§ 84-18. Election of councilors. Within thirty days after this article shall have gone into effect the judge of each judicial district shall, by notice posted at the front door of each courthouse within his district and by such other means as he shall think desirable, call a meeting of the attorneys residing within his district, and any others who may declare in writing their desire to be affiliated with that district, as hereinabove provided, for the purpose of organizing the bar of the district, the said meeting to be held at a place deemed by the judge to be convenient, on a day fixed, not less than twenty nor more than thirty days from posting of notice. At that meeting such attorneys as attend shall constitute a quorum, and shall forthwith form such organization herein referred

to as the "district bar," as they may deem advisable, of which organization all active members of the North Carolina State Bar entitled to vote in that district shall be members. The district bar shall be the subdivision of the North Carolina State Bar for that judicial district, and shall adopt such rules, regulations and bylaws not inconsistent with this article as it shall see fit, a copy of which shall be transmitted to the secretary-treasurer of the North Carolina State Bar when organized; and copies of any amendments of such rules, regulations, and bylaws shall likewise be sent to said secretary-treasurer. The district bar shall elect a councilor to represent that district and all elections of councilors, for regular terms, shall be held as provided by rules, regulations and bylaws adopted at the district bar. In case of a vacancy in the office or position of councilor by death, resignation or otherwise, the president of the district bar shall appoint a member of his district bar who shall serve as councilor for said unexpired term and until the next meeting of the district bar for the election of a councilor for that district. In case the judge of any judicial district, by reason of physical disability or otherwise, shall fail to call the meeting aforesaid within thirty days after this article shall have gone into effect, the same may be called within thirty days thereafter by any two attorneys residing in said district, by written notice signed by them and delivered to the clerk of the court of each county in the district to be posted at the front door of each courthouse as aforesaid, the said meeting to be held on a day fixed not less than twenty nor more than thirty days after the posting of said notice; and thereupon the same proceedings shall take place as though the meeting had been called by the judge as aforesaid. Any clerk to whom any such notice shall be delivered to be posted shall immediately post the same and shall write upon the said notice the exact date and time when the same is so posted. In case more than one notice shall be posted hereunder by different groups of attorneys, that posted first in point of time shall prevail and be deemed to be the notice provided for under this article. Pending the organization of the council as hereinafter provided, notification of the election of each councilor shall be sent within five days after such election by the secretary of the district bar to the

clerk of the Supreme Court of North Carolina; but after the organization of the council such notices shall be sent to its secretary-treasurer. In case neither the judge nor any two members shall call a meeting as aforesaid, a councilor for the said district, residing therein, shall be named at a meeting of such members of the council as shall have been elected in accordance herewith, to serve until such district bar shall be organized under the provisions of this article (except as to the time for calling meetings), either on the call of the judge of the district court or of two members of the bar, and shall have elected a councilor to serve for the unexpired term of the councilor so named.

§ 84-19. Change of judicial districts.—In the event that a new district shall hereafter be carved out of an existing district, the councilor for the old district shall remain in office and continue to represent the district consituting that portion of the old district in which he resides or with which he has elected to be affiliated; and within thirty days after the division of the old district shall have become effective, or so soon thereafter as practicable, the same procedure shall be followed for the organization of the North Carolina State Bar, constituting the remaining and unrepresented portion of the old district, and for the election of a councilor to represent the same, as is prescribed by § 84-18; and if a new district or more than one new district shall be formed by a recombination or reallocation of the counties in more than one existing district, the same procedure shall be followed as is prescribed by §84-18, in said new district, or in each of them if there be more than one, within thirty days after the election or appointment of the judge or judges thereof; but in that event the office of councilor for each of the old districts the counties in which shall have been so recombined into or reallocated to such new district or districts shall cease, determine, and become vacant so soon as the bar or bars of such new district, or all of such new districts if there shall be more than one, shall have been organized and shall have elected a councilor or councilors therefor, but not earlier: Provided, that if at such time any councilor whose office shall thus become vacant be actually serving upon a committee before which there is

pending any trial of a case of professional misconduct or malpractice, he shall, notwithstanding the election of a new councilor, continue to serve as councilor for the purpose of trying such case until judgment shall have been rendered therein.

Provided that procedures for organization of the district bars shall be in accordance with G. S. 84-18 and that beginning July 1, 1955, it is provided that new councilors for the first, tenth and fifteenth districts shall be elected for a term of one year; those from the sixth, thirteenth, eighteenth and twenty-seventh districts for a period of two years; and those from the eighth, ninth, twelfth and twenty-fourth districts for a period of three years; provided that in subsequent elections for the said district the terms shall be for three years. Such term shall run from the election of said councilors following organization of the district bars subsequent to April 20, 1955. The terms of councilors residing in the second, third, fourth, fifth, seventh, eleventh, fourteenth, sixteenth, seventeenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fifth, twenty-sixth, twenty-eighth, twenty-ninth, and thirtieth districts shall continue under the terms and conditions as when elected or appointed and their successors for said district shall be elected for a term of three years from the date of the expiration of the said terms, provided that if at the time of the organization of the district bar the term of the councilor who is a resident of the said district having expired or a vacancy existing by death, resignation or otherwise, then at the organization of said district bar provision may be made for the election or appointment of a councilor to represent the said district.

As soon as may be practicable following the organization of the several district bars where the composition of such districts shall have had a change in the counties comprising said district, the officers of the district being divided or rearranged shall for the purpose of preservation, forward the records of the expiring district bar to the council of the North Carolina State Bar who shall preserve the same in the offices of the North Carolina State Bar.

§ 84-20. Compensation of councilors.—The members of the council and members of committees when actually engaged in the performance of their duties, including committees siting upon disbarment proceedings, shall receive as compensation, not exceeding ten ($10.00) dollars per day for the time spent in attending meetings, and shall receive actual expenses of travel and subsistence while engaged in his duties provided that for transportation by use of private automobile the expense of travel shall not exceed seven cents per mile. The council shall determine per diem, subsistence and mileage to be paid. Such allowance as may be fixed by the council shall be paid by the secretary-treasurer of the North Carolina State Bar upon certified statements presented by each member.

§ 84-21. Organization of council; publication of rules, regulations and bylaws.—Upon receiving notification of the election of a councilor for each judicial district, or, if such notification shall not have been received from all said districts, within one hundred and twenty (120) days after this article shall have gone into effect, the clerk of the Supreme Court of North Carolina shall call a meeting of the councilors of whose election he shall have been notified, to be held in the city of Raleigh not less than twenty days nor more than thirty days after the date of said call; and at the meeting so held the councilors attending the same shall proceed to organize the council by electing officers, taking appropriate steps toward the adoption of rules and regulations, electing councilors for judicial districts which have failed to elect them, and taking such other action as they may deem to be in furtherance of this article. The regular term of all officers shall be one year, but those first elected shall serve until the first day of January, one thousand nine hundred thirty-five. The council shall be the judge of the election and qualifications of its own members. When the council shall have been fully organized and shall have adopted such rules, regulations and bylaws, not inconsistent with this article, as it shall deem necessary or expedient for the discharge of its duties, the secretary-treasurer shall file with the clerk of the Supreme Court of North Carolina a certificate, to be called the "certificate of

organization," showing the officers and members of the council, with the judicial districts which the members respectively represent, and their post-office addresses, and the rules, regulations and bylaws adopted by it; and thereupon the Chief Justice of the Supreme Court of North Carolina, or any judge thereof, if the court be then in vacation, shall examine the said certificate and, if of opinion that the requirements of this article have been complied with, shall cause the said certificate to be spread upon the minutes of the court; but if of opinion that the requirements of this article have not been complied with, shall return the said certificate to the secretary-treasurer with a statement showing in what respects the provisions of this article have not been complied with; and the said certificate shall not be again presented to the Chief Justice of the Supreme Court or any judge thereof, until any such defects in the organization of the council shall have been corrected, at which time a new certificate of organization shall be presented and the same course taken as hereinabove provided, and so on until a correct certificate showing the proper organization of the council shall have been presented, and the organization of the council accordingly completed. Upon (a) the entry of an order upon the minutes of the court that the requirements of this article have been complied with, or (b) if for any reason the Chief Justice or judge should not act thereon within thirty days, then, after the lapse of thirty days from the presentation to the Chief Justice or judge, as the case may be, of any certificate of organization hereinabove required to be presented by the secretary-treasurer, without either the entry of an order or the return of said certificate with a statement showing the respects in which this article has not been complied with, the organization of the council shall be deemed to be complete, and it shall be vested with the powers herein set forth; and the certificate of organization shall thereupon forthwith be spread upon the minutes of the court. A copy of the certificate of organization, as spread upon the minutes of the court, shall be published in the next ensuing volume of the North Carolina Reports. The rules and regulations set forth in the certificate of organization, and all other rules and regulations which may be adopted by the council under this article, may

be amended by the council from time to time in any manner not inconsistent with this article. Copies of all such rules and regulations adopted subsequently to the filing of the certificate of organization, and of all amendments so made by the council, shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by it upon its minutes, and published in the next ensuing number of the North Carolina Reports: Provided, that the court may decline to have so entered upon its minutes any of such rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this article.

§ 84-22. Officers and committees of the North Carolina State Bar.—The officers of the North Carolina State Bar shall be a president, a first vice-president, a second vice-president, and a secretary-treasurer, who shall be deemed likewise to be the officers, with the same titles of the council. Their duties shall be prescribed by the council. The president and vice-presidents shall be elected by the members of the North Carolina State Bar at its annual meeting, and the secretary-treasurer shall be elected by the council. All officers shall hold office for one year and until their successors are elected and qualified. The officers need not be members of the council.

§ 84-23. Powers of council.—Subject to the superior authority of the General Assembly to legislate thereon by general laws, and except as herein otherwise limited, the council is hereby vested, as an agency of the State, with the control of discipline, disbarment and restoration of attorneys practicing law in this State: Provided, that from any order suspending an attorney from the practice of law and from any order disbarring an attorney, an appeal shall lie in the manner hereinafter provided, to the superior court of the county wherein the attorney involved resides. The council shall have power to administer this article; to formulate and adopt rules of professional ethics and conduct; to publish an official journal concerning matters of interest to the legal profession, and to do all such things necessary in the furtherance of the purposes of this article as are not prohibited by law.

§ 84-24. Admission to practice.—The provisions of the law now obtaining with reference to admission to the practice of law, as amended, and the rules and regulations prescribed by the Supreme Court of North Carolina with reference thereto, shall continue in force until superseded, changed or modified by or under the provisions of this article.

For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of seven members of the Bar, elected by the council of the North Carolina State Bar, who need not be members of the council. No teacher in any law school, however, shall be eligible. The members of the Board of Law Examiners elected from the Bar shall each hold office for a term of three years: Provided, that the members first elected shall hold office, two for one year, two for two years, and two for three years.

The secretary of the North Carolina State Bar shall be the secretary of the Board, and serve without additional pay. The Board of Law Examiners shall elect a member of said Board as chairman thereof, who shall hold office for such period as said Board may determine.

The examination shall be held in such manner and at such times as the Board of Law Examiners may determine.

The Board of Law Examiners, subject to the approval of the council, shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of such change.

All such rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in § 84-21 in relation to the certificate

of organization and the rules and regulations of the council.

Whenever the council shall order the restoration of license to any person as authorized by § 84-32, it shall be the duty of the Board of Law Examiners to issue a written license to such person, noting thereon that the same is issued in compliance with an order of the council of the North Carolina State Bar, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance.

Appeals from the Board shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G. S. 84-21 or as may be promulgated by the Supreme Court.

§ 84-25. Fees of applicants.—All applicants before the Board of Law Examiners shall pay such fees as prescribed under the rules of said Board as may be promulgated under G. S. 84-21 and G. S. 84-24.

§ 84-26. Pay of Board of Law Examiners.—Each member of the Board of Law Examiners shall receive the sum of fifty dollars for his services in connection with each examination and shall receive his actual expenses of travel and subsistence while engaged in duties assigned to him, provided that for transportation by the use of private automobile the expense of travel shall not exceed seven cents per mile.

§ 84-27. Repealed by Session Laws 1945, c. 782.

§ 84-28. Discipline and disbarment.—The council or any committee of its members appointed for that purpose, or designated by the Supreme Court,

(1) Shall have jurisdiction to hear and determine all complaints, allegations, or charges of malpractice, corrupt or unprofessional conduct, or the violation of professional ethics, made against any member of the North Carolina State Bar;

(2) May administer the punishments of private reprimand, suspension from the practice of law for a period not exceeding twelve months, and disbarment as the case shall in their judgment warrant, for any of the following causes:

a. Commission of a criminal offense showing professional unfitness;

b. Detention without a bona fide claim thereto of property received or money collected in the capacity of attorney;

c. Soliciting professional business;

d. Conduct involving willful deceit or fraud or any other unprofessional conduct;

e. Detention without a bona fide claim thereto of property received or money collected in any fiduciary capacity;

f. The violation of any of the canons of ethics which have been adopted and promulgated by the council of the North Carolina State Bar.

(3) May invoke the processes of the courts in any case in which they deem it desirable to do so and formulate rules of procedure governing the trial of any such person. Such rules shall make provision for:

a. Setting forth the charges in the form required for a complaint in a civil action in the superior court.

b. Notice of the charges by the service upon the person charged of a copy of the said complaint. Such service may be made by any officer authorized to serve legal processes wherever the person charged may be found.

c. The right of the defendant to file a written and verified answer in which he may plead any defense to the merits of the charge, the sufficiency of the charge as alleged, or any other defense available to him. All defenses must be asserted by verified answer.

d. The right of the person charged to demand a trial:

1. In the superior court at a regular term for the trial of civil cases by a judge and a jury, or by written agreement of all parties, trial by jury may be waived and the facts found by the judge, or

2. By a committee of not less than three members of the Bar who are not members of the council and are actively practicing in the State, such committee to be designated by the Supreme Court, or

3. By a committee of not less than three members of the council. The election permitted shall be made in the answer, and if no election is made in the answer the person charged shall be conclusively deemed to have elected to be tried by a committee of the council. If the person charged shall not elect to be tried in the superior court in term as above provided, he shall be conclusively deemed to have waived all right to a trial by jury.

e. The certification, if the person charged shall elect to be tried in the superior court, of the original complaint and answer shall be made to the clerk of the superior court of the county in which such person shall reside if he resides in this State, or to the clerk of the superior court of

Wake County if he does not reside in this State. The proceeding shall not be subject to dismissal if certification is made to the wrong county, but the person charged may move in the superior court to which certification is made for removal to the proper county. After certification all proceedings in connection with the charge shall be conducted in the superior court in term in accordance with the laws and rules relating to civil actions, with right of appeal to the Supreme Court.

f. For the trial of the person charged before a committee (if trial by a jury is waived) selected in accordance with the foregoing provisions, which trial shall conform as nearly as practicable to the procedure provided by law before referees in references by consent with the right to appeal to the superior court by the filing of exceptions with the council and from order or judgment of the council, the entire record shall be filed with the clerk of the superior court of the county in which the person charged resides if he resides within the State, or in Wake County if the person charged does not reside within the State, and thereafter all proceedings in connection with the charge shall be conducted in the superior court in term in accordance with the laws and rules relating to civil actions in which there has been a reference by consent, but neither party shall be entitled to a trial by jury. Both parties shall have the right to appeal to the Supreme Court in accordance with the procedure permitting appeals in civil actions.

Trial before the committee appointed for that purpose by the council, or designated by the Supreme Court, shall be held in the county in which the accused member resides or if the accused is residing outside of the State, then in Wake

County: Provided, however, that the committee conducting the hearing shall have power to remove the same to any county in which the offense, or any part thereof, was committed, if in the opinion of such committee the ends of justice or convenience of witnesses require such removal. The procedure herein provided shall apply in all cases of discipline or disbarments arising under this section.

Whenever the council shall have directed a hearing upon any charges against a member of the bar and said member shall request it to do so, the council shall advise the Supreme Court of the same and request the Supreme Court, through the Chief Justice, to designate a committee of not less than three members of the bar who are not members of the council, and who are actively practicing in the State, to sit as a trial committee to hear the cause; said committee when so designated shall proceed in the same manner as in the case of a committee of the council and under the same procedures set forth herein or as prescribed by rules adopted by the council and approved by the Supreme Court.

§ 84-29. Concerning evidence and witness fees.—In any investigation of charges of professional misconduct the council and any committee thereof, and any committee designated by the Supreme Court, shall have power to summon and examine witnesses under oath, and to compel their attendance, and the production of books, papers, and other documents or writings deemed by it necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary-treasurer or the president of the council or the chairman of the committee appointed to hear the charges, and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness or other person who shall refuse or neglect to appear in obedience thereto, or to testify or produce the books papers, or other documents or writings required, shall be liable to punishment for contempt either by the council or its committee, but with the right to appeal therefrom. Depositions may be taken in any investigations of professional misconduct as in civil proceedings; but the council or the

committee hearing the case may, in its discretion, whenever it believes that the ends of substantial justice so require, direct that any witness within the State be brought before it. Witnesses giving testimony under a subpoena before the council or any committee thereof or any committee designated by the Supreme Court or by deposition shall be entitled to the same fees as in civil actions.

In cases heard before the council or any committee thereof or any committee designated by the Supreme Court, if the party shall be convicted of the charges against him, he shall be taxed with the cost of the hearings: Provided, however, that such bill of costs shall not include any compensation to the members of the council or committee before whom the hearings are conducted.

§ 84-30. Rights of accused person.—Any person who shall stand charged with an offense cognizable by the council or any committee thereof, or any committee designated by the Supreme Court, shall have the right to invoke and have exercised in his favor the powers of the council and its committees, or any committee designated by the Supreme Court, in respect of compulsory process for witnesses and for the production of books, papers, and other writings and documents, and shall also have the right to be represented by counsel.

§ 84-31. Designation of prosecutor; compensation.—Whenever charges shall have been preferred against any member of the Bar, and the council shall have directed a hearing upon the charges, it shall also designate some member of the Bar to prosecute said charges in such hearings as may be held, including hearing upon appeals in the superior and supreme courts. The council may allow the attorney performing such services at its request such compensation as it may deem proper.

§ 84-32. Records and judgments and their effect; restoration of licenses. — In the case of persons charged with an offense cognizable by the council or any committee thereof,

or any committee designated by the Supreme Court, a complete record of the proceedings and evidence taken before the council or any committee thereof, or any committee designated by the Supreme Court, shall be made and preserved in the office of the secretary-treasurer, but the council may, upon sufficient cause shown and with the consent of the person so charged, cause the same to be expunged and destroyed. Final judgments of suspension or disbarment shall be entered upon the judgment docket of the superior court of the county wherein the accused resides, and also upon the minutes of the Supreme Court of North Carolina; and such judgment shall be effective throughout the State.

Whenever an attorney desires to voluntarily surrender his license to the council and the council consents to accept the same, he shall make such request and surrender in writing directed to the council and the council shall enter an order containing the conditions of acceptance of said license and a copy of such order shall be filed with the clerk of the Supreme Court and with the clerk of the superior court of the county of residence or prior residence of the licensee; provided, however, that the council may refuse to accept surrender of license in any case.

Whenever any attorney has been deprived of his license, the council, in its discretion, may restore said license upon due notice being given and hearing had and satisfactory evidence produced of proper reformation of the licentiate before restoration.

§ 84-33. Annual and special meetings.—There shall be an annual meeting of the North Carolina State Bar, open to all members in good standing, to be held at such place and time after such notice (but not less than thirty days) as the council may determine, for the discussion of the affairs of the Bar and the administration of justice; and special meetings of the North Carolina State Bar may be called, on not less than thirty days' notice, by the council, or on the call, addressed to the council, of not less than twenty-five per cent of the active members of the North

Carolina State Bar; but at special meetings no subjects shall be dealt with other than those specified in the notice. Notice of all meetings, whether annual or special, may be given by publication in such newspapers of general circulation as the council may select, or, in the discretion of the council, by mailing notice to the secretary of the several district bars or to the individual active members of the North Carolina State Bar. The North Carolina State Bar shall not take any action in respect of any decision of the council or any committee thereof relating to admission, exclusion, discipline or punishment of any person or other action, save after notice in writing of the action of the council or committee proposed to be directed or overruled, which notice shall be given to the secretary-treasurer thirty days before the meeting, who shall give, by mail, at least fifteen days' notice to the members of the North Carolina State Bar, and unless at the meeting two-thirds of the members present and voting shall favor the motion to direct or overrule. At any annual or special meeting ten per cent of the active members of the Bar shall constitute a quorum; but there shall be no voting by proxy.

§ 84-34. Membership fees and list of members.—Every active member of the North Carolina State Bar shall on or before the first day of January, nineteen hundred and thirty-four, pay to the secretarytreasurer, without demand therefor, in respect of the calendar year nineteen hundred and thirty-three, a membership fee of three dollars, and shall thereafter, prior to the first day of July of each year, beginning with and including the year nineteen hundred and thirty-four, pay to the secretary-treasurer, in respect of the calendar year in which such payment is herein directed to be made, an annual membership fee of three dollars, and shall thereafter, prior to the first day of July of each year, beginning with the calendar year one thousand nine hundred and thirty-nine, pay to the secretary-treasurer, in respect to the calendar year in which such payment is herein directed to be made, an annual mmbership fee of five dollars; and shall thereafter, prior to the first day of July, beginning with the calendar year 1955, pay to the secretary-treasurer, in respect to the

calendar year in which such payment is herein directed to be made, an annual membership fee of ten dollars ($10.00); and in every case the member so paying shall notify the secretary-treasurer of his correct post-office address; and shall thereafter, by the first day of July of each year beginning with and including the year 1961, pay to the secretary-treasurer in respect to the calendar year in which such payment is herein directed to be made, an annual membership fee of twenty dollars ($20.00), and every member shall notify the secretary-treasurer of his correct post-office address. The said membership fee shall be regarded as a service charge for the maintenance of the several services prescribed in this article, and shall be in addition to all fees now required in connection with admissions to practice, and in addition to all license taxes now or hereafter required by law. The said fee shall not be prorated: Provided, that no fee shall be required of an attorney licensed after this article shall have gone into effect until the first day of July of the second calendar year (a "calendar year" for the purposes of this article being treated as the period from January first to December thirty-first) following that in which he shall have been licensed; but this proviso shall not apply to attorneys from other states admitted on certificate. The said fee shall be disbursed by the secretary-treasurer on the order of the council. The secretary-treasurer shall annually, at a time and in a law magazine or daily newspaper to be prescribed by the council, publish an account of the financial transactions of the council, in a form to be prescribed by it. The secretary-treasurer shall compile and keep currently correct from the names and post-office addresses forwarded to him and from any other available sources of information a list of members of the North Carolina State Bar and furnish to the clerk of the superior court in each county, not later than the first day of October in each year, a list showing the name and address of each attorney for that county who has not complied with the provisions of this article. The name of each of the active members who shall be in arrears in the payment of membership fees for one or more calendar years shall be furnished to the presiding judge at the next term of the superior court after the first day of October of each

year, by the clerk of the superior court of each county wherein said member or members reside, and the court shall thereupon take such action as is necessary and proper. The names and addresses of such attorneys so certified shall be kept available to the public. The Commissioner of Revenue is hereby directed to supply the secretary-treasurer, from his record of license tax payments, with any information for which the secretary-treasurer may call in order to enable him to comply with this requirement.

The said list submitted to the several clerks of the superior court shall also be submitted to the council of the North Carolina State Bar at its October meeting of each year and it shall take such action thereon as is necessary and proper.

§ 84-35. Saving as to North Carolina Bar Association.—Nothing in this article contained shall be construed as affecting in any way the North Carolina Bar Association, or any local bar association.

§ 84-36. Inherent powers of courts unaffected.—Nothing contained in this article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys.

§ 84-37. State Bar may investigate and enjoin unauthorized practice.—(a) The council or any committee of its members appointed for that purpose may inquire into and investigate any charges or complaints of unauthorized or unlawful practice of law. The council may bring or cause to be brought and maintain in the name of the North Carolina State Bar an action or actions, upon information or upon the complaint of any private person or of any bar association against any person, partnership, corporation or association and any employee, agent, director, or officer thereof who engages in rendering any legal service or makes it a practice or business to render legal services which are unauthorized or prohibited by law or statutes relative thereto. No bond for cost shall be required in such proceeding.

(b) In an action brought under this section the final judgment if in favor of the plaintiff shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted upon proof or by affidavit, that the defendant or defendants have violated any of the laws or statutes applicable to unauthorized or unlawful practice of law. The provisions of statute or rules relating generally to injunctions as provisional remedies in actions shall apply to such a temporary injunction and the proceedings thereunder.

(c) The venue for actions brought under this section shall be the superior court of any county in which such acts constituting unauthorized or unlawful practice of law are alleged to have been committed or in which there appear reasonable grounds that they will be committed or in the county where the defendants in such action reside.

(d) The plaintiff in such action shall be entitled to examination of the adverse party and witnesses before filing complaint and before trial in the same manner as provided by law for the examination of parties.

(e) This section shall not repeal or curtail any remedy now provided in cases of unauthorized or unlawful practice of law, and nothing contained herein shall be construed as disabling or abridging the inherent powers of the court in such matters.

§ 84-38. Solicitation of retainer or contract for legal services prohibited; division of fees.—It shall be unlawful for any person, firm, corporation, or association or his or their agent, agents, or employees, acting on his or their behalf, to solicit or procure through solicitation either directly or indirectly, any legal business, whether to be performed in this State or elsewhere, or to solicit or procure through solicitation either directly or indirectly, a retainer or contract, written or oral, or any agreement authorizing an attorney or any other person, firm, corporation, or association to

perform or render any legal services, whether to be performed in this State or elsewhere.

It shall be unlawful for any person, firm, corporation, or association to divide with or receive from any attorney at law, or group of attorneys at law, whether practicing in this State or elsewhere, either before or after action is brought, any portion of any fee or compensation charged or received by such attorney at law, or any valuable consideration or reward, as an inducement for placing or in consideration of being placed in the hands of such attorney or attorneys at law, or in the hands of another person, firm, corporation or association, a claim or demand of any kind, for the purpose of collecting such claim or instituting an action thereon or of representing claimant in the pursuit of any civil remedy for the recovery thereof, or for the settlement or compromise thereof, whether such compromise, settlement, recovery, suit, claim, collection or demand shall be in this State or elsewhere. This paragraph shall not apply to agreements between attorneys to divide compensation received in cases or matters legitimately, lawfully and properly received by them.

Any person, firm, corporation or association of persons violating the provisions of this section shall be guilty of a misdemeanor and punished by fine or imprisonment or both in the discretion of the court.

The council of the North Carolina State Bar is hereby authorized and empowered to investigate and bring action against persons charged with violations of this section and the provisions as set forth in § 84-37 shall apply. Nothing contained herein shall be construed to supersede the authority of solicitors to seek injunctive relief or institute criminal proceedings in the same manner as provided for in § 84-7. Nothing herein shall be construed as abridging the inherent powers of the courts to deal with such matters.

Appendix "B"

Article VI, § 5

c. Committee on Grievances of not less than three Councilors elected by the Council.

1. It shall be the duty of the Committee on Grievances to investigate and study all complaints which may be made against members of the State Bar. The Committee may include in its investigation all matters which may come to its attention with reference to the member complained of. It shall make a report to the Council at each quarterly meeting of the action taken by it upon all matters which have come to its attention, and, if the action recommended be other than dismissal of the complaint, it shall state the facts and circumstances which have come to its attention in connection with the complaint. If the recommendation of the Committee on Grievances is for dismissal of the charges, the report shall be private. It shall not be necessary to examine witnesses, but the Committee shall have authority to require affidavits or other statements in sufficient form and substance to satisfy it as to the probable truth of the charges contained in the complaint.

2. The Secretary shall require all complaints to be in the form of affidavits upon forms prepared for such purpose. Where the complaint on its face requires it, the Secretary shall obtain certified copies of court records, or verified copies of any other exhibit or exhibits, which shall accompany and be attached to the complaint.

3. All verified complaints lodged with the Secretary shall be immediately forwarded to the Chairman of the Grievance Committee for initial screening.

4. If the Chairman of the Grievance Committee is of the opinion that the complaint should be entertained, he shall forthwith proceed to issue letter of notice to the accused

attorney, setting forth the substance of the charges made against him in sufficient detail to enable such accused attorney to file an intelligent answer thereto, and notifying the accused attorney to file his preliminary answer to the charges within 15 days of the receipt of such letter of notice, and further advising such accused attorney that he may attach to his answer such exhibits as he may desire, which letter of notice shall be forwarded to such accused attorney by certified or registered mail. The answer need not be verified, but all exhibits attached thereto must be certified.

5. Any action taken by the Chairman of the Grievance Committee shall be reviewed by the full Committee.

6. After answer has been filed by the accused attorney, or the time for filing such answer has expired, the Grievance Committee shall consider the charges filed and make recommendation to the full Council.

7. Where any complaint has been entertained by the Grievance Committee, the Secretary shall keep a docket on such case, listing thereon the action taken, the date thereof, and the progress of the case from the time of its original institution until its final conclusion.

Article IX.

Discipline and Disbarment of Attorneys.

§ 1. Action on Report of Grievance Committee.—Upon the receipt of the report of the Grievance Committee, and its recommendatons, the Council will determine at a regular meeting, its course in reference to the matters recommended by the Grievance Committee and shall adopt, modify, reject or remand the said report to the Grievance Committee for further investigation, but no judgment shall be entered against any accused attorney except after a hearing has been had thereon, as provided in Art. 4, Chapter 84, of the General Statutes, and herein, unless the accused attorney shall waive such hearing.

§ 2. Procedure on Hearing.—In case the Council decides to direct a hearing upon the matters, or any of them, so reported by the Grievance Committee, the following procedure shall be followed:

(a) At the quarterly meeting of the Council at which a hearing of the accused attorney is ordered, the Council shall name and designate a trial committee of not less than three Councilors. If the accused attorney does not elect to be heard by a trial committee designated by the Supreme Court of North Carolina or demand a trial in the Superior Court at a regular term for trial of civil cases by a judge and jury, or by written agreement of all parties, trial by jury being waived and facts being found by the judge, as provided by Chapter 84-28 and these regulations, the trial committee named and designated by the Council shall be the trial committee for the hearing of the charges preferred against such accused attorney, and shall sit at the hearing and preside over all proceedings had thereat. The names of the Councilors designated by the Council for such purpose shall not be made public or disclosed to the accused attorney until the time within which such accused attorney may elect to be tried by a trial committee designated by the Supreme Court or a trial by jury in the Superior Court as provided by statute shall have expired.

If such accused attorney exercises his right to be tried by a trial committee designated by the Supreme Court or demand a trial in the Superior Court, as provided by staute, such election shall automatically discharge as trial committee Councilors as theretofore designated by the Council, and thereafter, the accused attorney shall be notified by the Secretary of the Council the personnel of such trial committee appointed by the Supreme Court or certification shall be made to the Clerk of the Superior Court of the county in which such person shall reside if he resides in this state, or to the Clerk of the Superior Court of Wake County if he does not reside in this state, as the case may be.

The trial committee hearing the charges against the ac-

cused attorney, whether it be the committee appointed by the Supreme Court or by the Council, shall proceed under the rules and regulations adopted by the Council and the statutory provisions governing such hearings.

(b) As expeditiously as possible following the adjournment of such quarterly meeting of the Council at which a hearing of the accused attorney was ordered a verified written complaint shall be formulated by the Council, or under its direction, showing in separate paragraphs the nature and substance of all charges preferred against such accused attorney, and approved by the Council.

The complaint shall be accompanied by a notice, notifying said attorney that he may, pursuant to the provisions of Chapter 84-28 of the General Statutes of North Carolina, elect to be heard before a trial committee appointed for that purpose by the Council, or a trial committee designated by the Supreme Court, or demand a trial in the Superior Court at a regular term for the trial of civil cases by a judge and a jury or by written agreement of all parties, trial by jury be waived and the facts found by the judge; further notifying said attorney to make his election in his answer; and further notifying said attorney that upon his failure to do so, he shall be conclusively deemed to have waived his right to such election and will be heard by a trial committee appointed by the Council.

The complaint and notice shall be served by the Sheriff of the county in which said attorney resides, by delivering to him two copies of said notice and complaint. The Secretary of the Council shall pay to such Sheriff for such service, from the funds of the North Carolina State Bar such fees as may be allowed in his county for the service of summons in civil actions.

(c) The attorney, within thirty (30) days immediately following service of notice and statement of charges upon him as hereinbefore provided, may file a verified answer to the charges set out in said complaint, the original of which

and two copies thereof shall within said period, be filed in the office of the Secretary of the North Carolina State Bar. Every material allegation of the verified complaint not controverted by the answer or to which no answer is made, for the purpose of the action, shall be taken as true and the trial committee may consider the facts therein contained as conceded and no other proof of the same shall be necessary.

(d) The trial committee appointed by the Council, or the Supreme Court, as the case may be, following the filing of the answer by the accused attorney, if an answer be filed, and if no answer be filed, then following the expiration of the time for filing answer, shall proceed to hear the charges preferred against the accused attorney as promptly as possible in order that the ends of justice may be served, and the rights of the accused attorney and of the public generally may be fully protected and preserved. The Chairman of the trial committee shall set a time and place for said hearing, and thereafter, not less than ten (10) days prior to the date thereof, the Secretary of the North Carolina State Bar shall cause notice of the time and place of such hearing to be given said accused attorney by certified or registered mail.

(e) At such hearing, and throughout the pendency of such charges, the respondent shall be entitled to counsel; to have process to secure and compel the attendance of witnesses, the production of papers and books, documents and, upon request, the same shall be issued as prescribed in Art 4, Chapter 84, of the General Statutes. All process officers in the State of North Carolina shall be required to serve the same, and for such service shall receive fees allowed in their respective jurisdictions for the service of subpoenas issued by the Superior Courts.

(f) At said hearing, or hearings, a complete stenographic report of all testimony shall be had and the original and one copy of said testimony shall be filed with the Secretary of the Council.

(g) The cost of stenographic services for such trial shall

be paid by the Council upon bills rendered and approved as other expenses of the Council, and shall be taxed as a part of the costs, as provided in Art. 4, Chapter 84, of the General Statutes.

(h) At said hearing, or hearings, before said committee, respondent shall have the right to produce in his behalf all competent evidence and to testify in person in respect to the matters and things set out in said statement and notice.

(i) Counsel shall have the right to submit oral argument and written briefs under the direction of the said committee, and to present such arguments as may now be presented in the trial of civil actions in the Superior Court.

(j) After hearing all the evidence and considering the same, the said committee shall file its report, stating its findings of fact and making its conclusions thereon as to discipline or disbarment, or as to the innocence of the respondent. Said report in duplicate shall be filed with the Secretary of the Council and shall stand for hearing at the next regular meeting of the Council, but the Council shall have power to continue the hearing to specified dates.

(k) When the said Committee shall formulate its report, a copy thereof shall be sent, by cer fied or registered mail, to the respondent, and said respondent shall file his exceptions thereto with the Secretary of The North Carolina State Bar within ten (10) days from receipt of the copy of said report.

(l) The President of The North Carolina State Bar is empowered to extend the time provided herein for the filing of complaint, the filing of answer thereto, the time for filing exceptions by the accused attorney, or his counsel, to the report of the trial committee, or to the action of the Council upon such report, as, in his discretion, he may deem necessary, in order that the ends of justice may be met, having due regard to the rights of the respondent to have a full

and ample opportunity to present his defense, but also having due regard to the speedy conclusion of such hearing.

(m) Said Council shall consider said report at a regular meeting and shall determine upon the record of the said hearing, which shall consist of the said statement and notice served on the respondent, his answer, if any, the testimony taken by the said committee, its report, recommendations, and the briefs of counsel filed before said committee, if any, and when the same is considered by the Council, the said respondent shall be entitled to be heard by the Council in person or through counsel, before determination, but no testimony or evidence will be taken by the Council and none heard other than such as is contained in the record filed by the committee which conducted the hearings.

(n) Any evidence, discovered after the report of the committee hearing the matter has been filed with the Council, may be the subject of a motion before the Council at any time before final judgment to remand the said report to the committee, to the end that the said committee may hear said newly discovered evidence. Such motion, and the proof with respect thereto, shall be made and heard under the rules now applicable to motions for new trials in the Superior Court for newly discovered evidence in civil actions, and if the said report is remanded to said committee to hear said newly discovered evidence, then the same shall be heard by said committee, subject to its competency, and such other evidence as may be corroborative or contradictory thereof, may also be submitted, and the said committee shall include said newly discovered evidence in its report and shall make such further findings and recommendations as it may deem proper in the light of all the evidence. Notice of such motion shall be given to opposing counsel at least ten days before said motion is to be heard.

(o) Upon such record, after hearing the argument thereon, the Council shall render its judgment as authorized in Art. 4, Chapter 84, of the General Statutes, and amendments thereto, at a regular meeting, notice of which meeting shall

be given the respondent, who shall have the right to be present in person or through counsel.

(p) From any judgment or suspension from the practice, or disbarment, the said respondent may appeal, as provided in Art. 4, Chapter 84, of the General Statutes, and notice of such appeal shall be sufficiently given the said Council, if given orally, when said judgment is rendered at a meeting of said Council, or by service of written notice of the same on the Secretary-Treasurer thereof, within fifteen days from the rendition of said judgment by said Council, which fifteen days shall begin to run from the final adjournment of the meeting of said Council at which said judgment was rendered. A copy of said judgment duly certified by the Secretary-Treasurer shall be forthwith mailed to the respondent by registered letter, with return receipt requested.

(q) The record on appeal to the Superior Court shall consist of the statement and notice and answer, if any, and the transcript of the evidence, and the findings of fact and recommendations of the committee, and the findings and conclusions of the Council thereon, as well as the exceptions, if any, filed to the report of said committee by the respondent, and the judgment of the Council thereon and the assignments of error therein, as contended for by the respondent.

(r) The Secretary-Treasurer shall certify the evidence in question-and-answer form as taken at the hearing, to the Superior Court, on appeal, which appeal shall be sent to the Clerk of the Superior Court in the county of the residence of the respondent.

(s) Whenever charges shall have been preferred against any member of the Bar, and the Council shall have directed a hearing upon the charges, it shall also designate a member or members of the Bar to prosecute said charges in such hearings as may be held, including hearing upon appeals in the Superior and Supreme Courts. The Council may allow the counsel performing such services such compensation as it may deem proper.

(t) The Grievance Committee is charged with the duty of following the progress of all disciplinary matters coming before it and the progress of all hearings ordered by the Council, and shall make report to the Council at its regular quarterly meetings of the status of all hearings theretofore ordered by it, to the final conclusion thereof.

(u) In the case of persons charged with an offense cognizable by the Council, or any committee thereof, a complete record of the proceedings and evidence taken before the Council or any committee thereof shall be made and preserved in the office of the Secretary-Treasurer and the Secretary-Treasurer shall see that such record is had and preserved according to the orders of the Council.

The Council may, upon sufficient cause shown, and with the consent of the person charged, cause the said record to be expunged and destroyed.

(v) Final judgment of suspension from the practice or disbarment by the Council shall be certified by the Secretary-Treasurer to the Superior Court of the county wherein the respondent resides, and also to the Supreme Court of North Carolina. If the judgment of the Council shall be that the respondent be privately reprimanded, the Council shall formulate the reprimand and shall appoint one of its members to read and deliver the same and shall name the time and place for delivery thereof. The Secretary shall spread upon his minutes as a final judgment of the Council, the order of private reprimand, the name of the member of the Council to deliver the same, and the time and place therefor.

(w) Whenever any attorney has been deprived of his license under the provisions of Art. 4, Chapter 84, of the General Statutes, the Council, in its discretion, may restore said license upon due notice being given and hearing had and satisfactory evidence produced of proper reformation of the licentiate before restoration.

(x) Due notice of motion before said Council to restore

such license shall; in so far as it relates to the Council, be had by serving a written notice upon the Secretary-Treasurer of the Council by delivery of two copies thereof at least forty days prior to the hearing on said motion. In lieu of service the said Secretary-Treasurer may, in his discretion, accept service of said notice. Notice by publication shall also be made by applicant in a newspaper published in the county in which applicant resides once a week for four successive weeks.

(y) All hearings to restore licenses shall be had by the Council which shall make its findings and declare its conclusions thereon and enter its judgment upon the same. If, as a result of said hearing, the Council decides to restore said license, a copy of its judgment restoring the same shall be certified to the Superior Court of the county wherein the said licentiate resides, and if he then resides in a county other than the county where the judgment disbarring said licentiate has been recorded, then a copy shall be certified to the Superior Court in said county where said judgment of disbarment has been recorded, and a certified copy thereof shall be delivered to the Supreme Court, to the end that the same may be recorded in its minutes, and when so recorded the judgment of the Council restoring said license shall have full force and effect throughout the State.

(z) The cost of any proceedings for the restoration of license shall be paid by the person making application therefor.

§ 3. Nature and Place of Hearing.—All hearings on any complaint before the committee appointed by the Council or the Supreme Court to hear the same shall be public, and if possible, shall be held in the courthouse.

Article X.

Canons of Ethics and Rules of Professional Conduct.

No code or set of rules can be framed which will parti-

cularize all the duties of the lawyer in the varying phases of litigation or in all of the relations of professional life. The enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

9. Negotiations with Opposite Party

A lawyer should not in any way communicate upon the subject or controversy with a party represented by counsel; much less should be undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.